

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1121

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

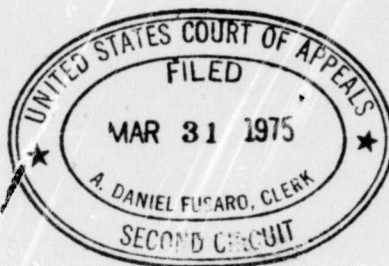
Docket No. 75-1121

IN THE MATTER OF
THOMAS DI BELLA,

A Witness Before a Special
May, 1974 Grand Jury in the
Eastern District of New York

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1121

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THOMAS DI BELLA,

A Witness Before a Special
May, 1974 Grand Jury in the
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On Appeal From The United States District Court
For The Eastern District of New York

APPELLANT'S BRIEF AND APPENDIX

Questions Presented for Review

1. Was the adjudication of contempt invalid because the prosecutor was not legally authorized to present evidence to the grand jury?
2. Was the adjudication of contempt invalid because the public, the witness, and the attorney for the witness were excluded from critical portions of the contempt proceedings?
3. Since the immunity order had been issued nine months prior to the present proceeding was it essential for the prosecution to seek and obtain a new immunity order - particularly since there had been a prior adjudication of contempt under the existing order. Did the failure to obtain a new order place the witness in double jeopardy? Did it violate the requirements and purposes of 18 U.S.C. §§ 6002 and 6003?

Preliminary Statement

Thomas Di Bella appeals from an Order of the United States District Court for the Eastern District of New York (Platt, D.J.), entered on March 3, 1975, which, in pertinent part, provided as follows:

"It is ordered adjudged and decreed that Thomas Di Bella is in direct contempt of this Court for his failure to answer questions before the said grand jury and he is hereby committed to the custody of the United States Marshall for the Eastern District of New York for six months or for the life of the aforesaid grand jury, whichever period is shorter, or until such time as he purges himself of this contempt."
(A. 49)*

Statement of Facts

A. The Prior Adjudication of Contempt.

On June 10, 1974, the witness-appellant, Thomas Di Bella [hereinafter "Di Bella"] was found to be in contempt by Chief Judge Mishler in the United States District Court for the Eastern District of New York. The basis of the finding was that, although

* References preceded by "A." are to the Appellant's Appendix, annexed hereto.

granted use or testimonial immunity, the witness refused to answer questions before a Federal grand jury. Judge Mishler's order conferring immunity upon Di Bella and directing him to testify is reproduced at A. 52.

Upon that finding of contempt, Judge Mishler ordered that Di Bella be imprisoned for six months or for the balance of the term of the grand jury, whichever was to occur first, unless Di Bella should earlier purge himself of contempt by giving the requested testimony. By his counsel, Philip Vitello, Esq., the witness defended against the contempt charge by alleging that the procedures followed in securing the grant of immunity did not comply with the requirements of the relevant immunity statute, 18 U.S.C. § 6003.** Under that statute, there is a two step procedure by which immunity may be authorized. First, approval must be secured from the Attorney General of the United States or from his designated Deputy, and then an application must be made to a United States District Court for an order directing the witness to testify under a grant of immunity. It was petitioner's contention that, in applying to the Attorney General for the immunity authorization, an Eastern District Strike Force Attorney had improperly and illegally

** Constitutional provisions and statutes involved are reproduced at A. 113-A. 119.

circumvented the local United States Attorney. Judge Mishler rejected the argument, held Di Bella in civil contempt, and sentenced him as already indicated.

An appeal was taken to this Court, and the order of contempt was affirmed in an opinion, In Re Di Bella, 499 F. 2d 1175 (2d Cir., July 3, 1974), cert. denied - U.S. - , 95 S. Ct. 513 (November 25, 1974). This Court's opinion is reproduced at A. 106.

While holding that it was not a necessary requirement that the local United States Attorney be a party to the request made to the Attorney General (step one), this Court's opinion went on to state:

***We do not suggest, however, that it is sound policy for even the first step to be taken without the knowledge and concurrence of the United States Attorney. Chief Judge Mishler properly emphasized '...the difficulty we have in having two law enforcement agencies in the District, one Strike Force and the other the United States Attorney....' He further remarked: '...I pointed up the problem that we have in having the Strike Force make applications in the name of the United States Attorney when the United States Attorney has no supervision or jurisdiction or very little. That's another problem. You might point that up to the Attorney General.' Nevertheless, these are questions of proper administration and do not affect the statutory requirement.

"We believe that this substantially disposes of the appeal. While appellant tells us that the

United States Attorney was ignorant of the application to the District Court for an order immunizing Di Bella - what we have called step three - the point is not emphasized. The obvious reason is that the nunc pro tunc proceeding, sensibly initiated by Judge Mishler, at which the United States Attorney appeared and signed the necessary papers, honored the apparent mandate of the statute. Cf. United States v. Giordano [416 U.S.] supra note 3 at 1177, note 12. On the other hand, the special attorney presses this issue claiming that even at this last stage the approval and participation of the United States Attorney is not required. Strictly speaking, the question is not before us because the United States Attorney, as indicated, did approve and sign the application for an order, albeit belatedly. But in the exercise of our supervisory power over a procedure that will obviously recur, we note that the wiser course in the future would be to directly involve the United States Attorney in the application to the District Court for an immunity order." (499 F. 2d at 1177-8; A. 111-A. 112).

On or about July 12, 1974, a stay of execution, previously ordered by this Court, expired, and Di Bella commenced service of the sentence.*** The grand jury in question continued in existence and the witness did not choose to purge himself. As a result, he served the six month sentence.

*** An application for a continuation of the stay was denied by Mr. Justice Marshall.

B. The Present Contempt Proceeding.

Subsequent to Di Bella's release from incarceration under Judge Mishler's finding of contempt, discussed supra, Di Bella was served with another subpoena to appear before the same grand jury. Again, the evidence was being presented to the grand jury by the same Strike Force prosecutor, Robert Del Grosso. On March 3, 1975, proceedings were held before District Judge Platt upon Mr. Del Grosso's application to have Di Bella again held in contempt upon the ground that he continued to testify before the grand jury (A. 1 et seq.).

During the course of the proceeding, Mr. Vitello specified several reasons why the Court should not find the witness in contempt. Specifically, he argued that Mr. Del Grosso's appointment as a Special Attorney was invalid since he had not been appointed by the Attorney General, himself, and since the document purporting to confer the appointment lacked specificity as to the proceedings and subject matter with regard to which Mr. Del Grosso was empowered to act. (A. 3-14).

Additionally, Mr. Vitello objected to the procedure followed by the District Judge in the contempt proceeding, itself. Thus, against the wishes of the defense, the public was cleared from the courtroom (A. 15), and, thereafter, even the witness and his attorney were

excluded from the courtroom when the transcript of Di Bella's appearance before the grand jury was read to the Court (A. 32-4).****

It will be recalled that the basis of Di Bella's prior adjudication of contempt was Chief Judge Mishler's Order of June 10, 1974, which conferred immunity upon Di Bella and directed him to testify (A. 52). Mr. Del Grosso's application for that order was directed to Di Bella's June 10, 1974 appearance before the grand jury (A. 53). With regard to the instant proceeding, the government chose not to secure a new immunity order, but rather, elected to proceed under the original immunity order which was now nine months old. Mr. Vitello argued that the original order could not validly be utilized in this subsequent proceeding (A. 17-22; 29, 36).

**** Nevertheless, various court attendants and the Judge's two law clerks were permitted to remain in the courtroom (A. 35). Judge Platt directed that the court reporter's minutes of what happened during this closed part of the proceeding not be furnished to the defense, but only to Mr. Del Grosso (A. 43). For that reason, that portion of the minutes does not appear in the Appendix to this brief. As transcribed, the available minutes are misleading since they do not specifically reveal the redaction (See: A. 34-5).

Argument

POINT I

THE APPOINTMENT OF THE ATTORNEY WHO CONDUCTED THESE PROCEEDINGS WAS NOT IN ACCORDANCE WITH THE LAW AND WAS, THEREFORE, VOID. SINCE THE ATTORNEY'S APPOINTMENT WAS INVALID, HE WAS NOT AUTHORIZED TO BE PRESENT IN THE GRAND JURY ROOM AND WAS NOT AUTHORIZED TO ASK QUESTIONS OF THE WITNESS. THE WITNESS WAS, THUS, JUSTIFIED IN NOT RESPONDING TO THOSE QUESTIONS.

In prior proceedings before this Court with regard to this witness and this investigation the attorney who was presenting evidence to the grand jury was Robert Del Grosso. See: In Re Di Bella, 499 F. 2d 1175 (2d Cir., 1974); A. 106. Since we have been provided with not additional information, we shall assume, for the purposes of this memorandum, that the facts are basically the same as are hereinafter recited.

In support of his claim that he fell within the category of "Special Attorney" under the laws of the United States, Mr. Del Grosso submitted to this Court his letter of appointment, dated November 30, 1972, signed by the Assistant Attorney General in charge of the Criminal Division, Henry E. Petersen. That letter stated as follows:

"Dear Mr. Del Grosso:

"The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose

identities are unknown to the Department at this time.

"As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file information and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

"Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

"You are to serve without compensation other than the compensation you are now receiving under existing appointment.

"Please execute the required oath of office and forward a duplicate thereof to the Criminal Division."

Also presented by Mr. DelGrosso in support of his contention was his oath of office which recited that his appointment was "pursuant to the authorization of Henry E. Peterson, Assistant Attorney General, Criminal Division."

On appeal in the prior proceedings, Mr. DelGrosso contended that the Assistant Attorney General's power to make such an appointment was predicated upon the provisions

of 28 U.S.C. § 510 and § 515(a), as well as 28 C.F.R. § 0.55(g).

28 C.F.R. § 0.55(g) merely provides:

"Subject to the general supervision and direction of the Attorney General, the following described matters are assigned to, and shall be conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division:

* * *

"(g) Coordination of enforcement activities directed against organized crime and racketeering."

28 U.S.C. § 510 merely provides:

"The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

Certainly, neither the quoted regulation nor the quoted statute authorizes an Assistant Attorney General to appoint an attorney to a position which carries the powers claimed to be possessed by Strike Force Attorneys.

Likewise, reliance upon 28 U.S.C. § 515(a) would be grossly misplaced. That statute provides:

"The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General, may, when specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal including grand jury proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct whether or not he is a resident of the district in which the proceeding is brought."
[Emphasis added]

There is, in fact, no evidence that the Attorney General of the United States specifically, or even generally, directed the "Special Attorney" in the instant case to do anything, or even empowered him to call himself a "Special Attorney." While it is true that the letter of appointment, quoted supra, purports to confer the status described by 28 U.S.C. § 515(a), there is no showing that the Assistant Attorney General had the power to make such a broad grant of authority. Additionally, even if the Attorney General, himself, had appointed the Special Attorney, the broad grant of authority described in the letter of appointment appears to violate the specificity requirement of 28 U.S.C. § 515(a).

Our reasoning, in this regard, is supported by the recent decisions of several Federal Courts. United States v. Williams, 16 C.R.L. 2223 (U.S.D.C.W.Mo., November 15, 1974); United States v. Wrigley, 16 C.R.L. 2443 (U.S.D.C. W.Mo., February 5, 1975); United States v. Crispino, Docket No. 74 Cr. 932 (S.D.N.Y., February 13, 1975 [Werker, DJ]; N.Y.L.J., February 18, 1975, p. 1);, although contrary views have also been expressed, United States v. Brown, Docket No. 74 Cr. 867 (S.D.N.Y., February 25, 1975 [Pollack, D.J.]; N.Y.L.J., February 26, 1975, p. 1); Sandello v. Curran, Docket No. M-11-188 (S.D.N.Y., February 27, 1975 [Tenney, D.J.] N.Y.L.J., February 28, 1975).

Both Williams and Wrigley, supra, were decided

by the same Federal District Judge (Oliver, D.J.). In both cases, a challenge was made to indictments which had been secured by virtue of evidence presented to a grand jury by Strike Force Attorneys. The Court's analysis of the powers of such attorneys is very similar to that which we have set forth, supra, and the Court concluded that the validity of the underlying grand jury proceedings would be dependent upon the ability of the Strike Force Attorneys to establish that they were, in fact, specially appointed by the Attorney General and that they have been, in fact, specifically directed by the Attorney General with regard to the subject matter and nature of the proceedings which they are to conduct. In Williams, the Strike Force thereafter refused to comply with the Judge's order of disclosure, and the indictment was dismissed. 16 C.R.L. 2225.

In Crispino, supra, Judge Werker held that:

"[T]he one element that is common to every case which has either upheld or dismissed challenges to the authority of Special Attorneys to appear before grand juries is that the commission letter at least describe particularly the type of cases...that the Special Attorneys were to present to grand juries.

"That element is conspicuously missing in this case. Nowhere is there an attempt to conform to the intent of Congress in limiting the appearance of Special Attorneys to 'cases of particular importance' where those 'specifically or particularly qualified' by reason of 'peculiar knowledge and skill' would be helpful to the prosecution

of important cases by the Government.

"Surely it is no argument to say that any violation of a 'federal criminal statute' involves a case of particular importance where those with peculiar knowledge and skill not possessed by the local U. S. Attorney and his assistants are needed to prosecute the case.

"The commission letter issued... is a bold assertion of authority by the Attorney General to appoint Special Attorneys in any case regardless of its importance and regardless of whether any particular skill or knowledge is required.

"If upheld, it would allow these Special Attorneys to supersede the local U.S. Attorneys.... Congress never intended to give such a broad authority when it passed the Act of 1906 even if the statute be for the 'protection of the United States' and no case construing that statute supports such a proposition.

"Moreover, the practice of a number of Attorney Generals for at least fifty years had been to make the commission letter as specific as possible so as to comply with the intent of Congress. Such a long-standing policy of construction...cannot be overlooked." (Crispino, at A. 79-81).

Since we have reproduced Judge Werker's thorough and scholarly opinion as part of the Appendix to this brief (A. 60 et seq.), we shall not burden this Court by a further restatement of his analysis. We respectfully incorporate by reference Judge Werker's factual assertions and legal conclusions with respect to the fatal effect of the lack of specificity in the

letter of appointment.

Subsequent to the filing of Judge Werker's opinion, several District Judges have ruled to the contrary in other cases (e.g., supra, p. 11). The government thereafter moved for reargument in Crispino, and, upon reargument, Judge Werker adhered to his original opinion. He filed a memorandum decision, reproduced at A. 100, in which he concisely and firmly considered and rejected the differing views of his brother Judges. We hereby incorporate by reference Judge Werker's rulings in this regard.

We differ, however, from Judge Werker's opinion on the question of whether the purported authorization by former Assistant Attorney General Henry E. Petersen was pursuant to a proper delegation by the Attorney General (Crispino, at A. 63). The letter of authorization in the present case, supra, pp. 8-9), was precisely the same as that in Crispino, except for the name of the Special Attorney and the date of authorization (Crispino, at A. 62). At footnote 3, the Crispino opinion provides the following analysis:

"28 C.F.R. § 0.55 reads in pertinent part as follows: 'subject to the general supervision and direction of the Attorney General, the following described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General in charge of the Criminal Division: (g) coordination of enforcement activities directed against organized crime and

racketeering.' Under 28 C.F.R. § .60 'the Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to grand juries in all cases assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division.'

"28 C.F.R. § 0.55 was amended by Order number 543-73, 38 F.R. 29585 (October 26, 1973) to read: 'subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General' The change does not affect the validity of the delegation to Mr. Petersen. For one thing, the amendment was made after Mr. Petersen had sent the commission letter to Mr. Padgett (June 1, 1973). Also, as discussed infra, nothing in the legislative history of what is now § 515 (a) indicates that Congress intended to limit the delegation of the Attorney General's power to appoint Special Attorneys. Compare United States v. Giordano, 416 U.S. 505, 512-523 (1974)."

It is respectfully submitted that the rationale of United States v. Giordano, 416 U.S. 505, 512-523 (1974) is perfectly applicable to the present case. 28 U.S.C. § 515 (A. 117- A. 118) contains an explicit statutory command that Special Attorneys be "specially appointed by the Attorney General" and "specifically directed by the Attorney General". How could Congress have been any more clear in requiring that "the mature judgment of a particular, responsible Department of Justice official [be] interposed as a critical pre-condition to" the appointment of a Special Attorney?

When it is realized that such an appointment has the affect of superseding, in whole or in part, the functions of the duly appointed local United States Attorney, as to whom the approval of the Senate is a precondition, the legislative purpose is abundantly clear. The very situation which now exists as a result of the creation of numerous "Strike Forces" stands stark witness to the need for individualized appointment by the Attorney General.

It is respectfully submitted that the regulations in question cannot override the specific Congressional intent set forth in § 515 (a). In any event, those same regulations merely delegate to the Assistant Attorney General in charge of the Criminal Division the responsibility of conducting, handling, or supervising those specified criminal violations utilizing duly appointed United States Attorneys and their assistants or duly appointed Special Attorneys. To argue that the regulations authorize the Assistant Attorney General to make the appointments in the first instance is nothing less than circular reasoning.

* * *

Mr. Del Grosso's purported appointment having been a nullity, and the scope of that appointment being utterly lacking in specificity, his appearance before the grand jury was unauthorized by law, and his questions

to Di Bella cannot provide a legal basis for a finding of contempt.

POINT II

THE EXCLUSION, AT FIRST, OF THE PUBLIC, AND THEN OF THE WITNESS AND HIS ATTORNEY, FROM THE CONTEMPT PROCEEDINGS, CONSTITUTED A DEPRIVATION OF THE WITNESS'S SIXTH AMENDMENT RIGHTS TO A PUBLIC TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

As noted supra, pp. 6-7, the District Court inexplicably and unilaterally, without any request from the government, excluded the public from these contempt proceedings and then excluded the witness and his attorney from the proceedings.

In the leading case of In Re Oliver, 333 U.S. 257 (1948), where a grand jury witness was tried for contempt, the Supreme Court of the United States unequivocally held that the witness was entitled to a public trial, and the failure to accord him a public trial required the reversal of the judgment of conviction. See also: Argersinger v. Hamlin, 407 U.S. 25, at 27-28 (1972). The holding of Oliver would appear to clearly require the reversal of the the judgment of contempt herein.

Additionally, it is respectfully submitted that in excluding the witness and his attorney from the proceedings, the witness was deprived both of his right to confrontation and cross-examination and his right to

the effective assistance of counsel. The failure to assure the presence of the accused "at every stage of the trial when his substantial rights may be affected by the proceedings against him," is a denial of due process. Hopt v. Utah, 110 U.S. 574 (1884).

It is significant to note that, in the prior contempt proceeding against this witness, Chief Judge Mishler found that the questioning by Mr. Del Grosso was grossly deficient. On the same day that the application for immunity was granted by Judge Mishler, Di Bella appeared before the grand jury. After giving his name and address, the following question was asked of him by Mr. Del Grosso:

"Q. Now, Mr. Di Bella, this investigation is the United States of America versus the Casa [sic] Nostra. The government has reason to believe that there is an organization widely known as the Cosa Nostra. It's an organized crime set-up -- basically what we're investigating here is what is known as the Columbo family. Now, I ask you, sir, are you a member of the Columbo family?"
(Proceedings of June 10, 1974, p. 32, included in the Appendix filed with this Court on the prior appeal, Docket No. 74-1813).

When the grand jury proceedings were read into the record before Judge Mishler (Tr. 31-6), he found that the questions which had been asked of Di Bella were deficient in several respects, both as to form and content, and determined that further questioning of the witness was required to remedy the defect (Tr. 36-7).

In contrast, the witness and his attorney were given absolutely no opportunity to hear the grand jury testimony which was read to Judge Platt or to contest the propriety of the specific questions which were asked of Di Bella. Cf. People v. Ianniello, 21 N.Y. 2d 418; 288 N.Y.S. 2d 462 (1968). As was stated in Ianniello:

"Whenever a witness demands to see his lawyer for counseling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so.*** By requiring the matter to be taken to the presiding justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. ***"

The failure of the Trial Judge to respect the above noted constitutional rights of the witness Di Bella mandates that the judgment of contempt be vacated.

POINT III

THE WITNESS WAS JUSTIFIED IN REFUSING TO RESPOND TO QUESTIONS BEFORE THE GRAND JURY SINCE THE ORDER OF JUDGE MISHLER CONFERRING IMMUNITY AND DIRECTING THE WITNESS TO TESTIFY HAD NO VALIDITY WITH REGARD TO THE SECOND GRAND JURY APPEARANCE.

As noted supra, pp.6-7, the prosecutor refused

to seek a new immunity order, but rather relied upon the order which had been issued by Judge Mishler nine months earlier.

Under the authority of 18 U.S.C. § 6002 and § 6003 (quoted at A. 113-A. 115), Judge Mishler's Order of June 10, 1974 stated that "...it is hereby ORDERED that Thomas Di Bella answer all questions directed to him by the aforesaid grand jury in the Eastern District of New York (A. 52). Having refused to abide by that Order, Di Bella was held in contempt by Judge Mishler. Now, without any additional Order, the government sought and obtained an additional adjudication of contempt for violation of the same Order. We respectfully submit that this constituted a violation of the defendant's Fifth Amendment right against double jeopardy. In any event, there was no continued vitality of Chief Judge Mishler's Order. A grant of immunity under § 6002 and § 6003 require specific findings as regards the necessity for the issuance of an immunity order. While such findings may properly have been made, both by the United States Attorney and by Chief Judge Mishler nine months earlier, no such findings can be presumed to have vitality nine months later. In short, the Strike Force has again sought to circumvent the requirements of § 6002 and § 6003. See: In Re Di Bella, supra, at pp.4-5). The same reasoning which induced this Court to exercise its supervisory jurisdiction

(supra, pp. 4-5) in the prior Di Bella case applies
a fortiori in the present case.

We respectfully submit, therefore, that the adjudication of contempt violated Di Bella's right against double jeopardy since it is based upon a violation of precisely the same Order, and also constituted a violation of the explicit requirements of 18 U.S.C. § 6002 and §6003.

Conclusion

For all of the above reasons, it is respectfully submitted that the judgment of contempt should be reversed and the witness should be ordered discharged forthwith.

Respectfully submitted,

HENRY J. BOITEL
PHILIP VITELLO

March 28, 1975

APPENDIX

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3 EASTERN DISTRICT OF NEW YORK
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5 IN THE MATTER OF :

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7 THOMAS DI BELLA :
8 - - - - - x

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10 United States Courthouse
11 Brooklyn, New York

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13 March 3, 1975

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15 B e f o r e :

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22 HONORABLE THOMAS C. PLATT, U.S.D.J.
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IRA RUBENSTEIN
ACTING OFFICIAL COURT REPORTER

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5 for the Eastern District of New York

6 BY: ROBERT DEL GRASSO
7 Assistant United States Attorney

8 PHILIP VITELLO, ESQ.
9 Attorney for Defendant.
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MR. VITELLO: Good morning, your Honor.

THE COURT: Is this your motion Mr. Vitello?

MR. VITELLO: Yes, your Honor. I submitted a copy of the memorandum of law. I don't know if you --

THE COURT: Are you Mr. Vitello or Mr. --

MR. VITELLO: Mr. Vitello.

THE COURT: Vitello?

MR. VITELLO: Yes.

Has your Honor received the memorandum?

THE COURT: I was just handed it right now.

What's the thrust of this? Is this the Judge Werker --

MR. VITELLO: Yes.

THE COURT: Decision?

MR. VITELLO: We go further than that, your Honor. It's our contention that the strike force are special attorneys without authority to present evidence to this Grand Jury --

THE COURT: Because of the Crispino case?

MR. VITELLO: Yes. And the Oliver and Williams cases in Wyoming. Of course, we also cite the decision of Judge Pollack, --

THE COURT: Judge Tenney?

MR. VITELLO: Judge Tenney.

THE COURT: How do you distinguish Judge Pollack

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1 and Judge Tenney's decisions?

2 MR. VITELLO: We say their decisions are erro-
3 neous, your Honor. We say Judge Werker's decision is
4 proper.

5 THE COURT: I read all three decisions. Let
6 me ask you this question. Looking at 28 U.S.C. Section
7 515 middle A.

8 MR. VITELLO: Yes.

9 THE COURT: Do you see anything in that section,
10 I looked kind of hard, which says "special cases".
11 As Judge Werker has said.

12 MR. VITELLO: I don't see it in that section but
13 that's the section that supports our contention.

14 THE COURT: I say there is no language in there
15 that says "in special cases" which Judge Werker said
16 it was meant to read when he specifically directed,
17 by "Attorney General"; by the, I can't find the word
18 in "special cases" in the statute.

19 MR. VITELLO: This is supposed to be a special
20 case but I don't argue this has to be a special case.
21 I argue that under 515a the Attorney General may appear
22 in any district, any Federal district of the United
23 States with the same powers as a United States Attorney.
24 Now this is the crux of the entire argument. I find
25 that our page thirteen "or any other officer of the

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1 Department of Justice or any attorneys, specially
2 appointed by the Attorney General."

3 Now, we have anyone in the Department of Justice
4 or any special attorney and this encompasses Mr.
5 Del Grasso. He has been designated as "special
6 attorney." "May, when specifically directed by the
7 Attorney General". And now, at no time did the Attor-
8 ney General of the United States specifically direct
9 Mr. Del Grasso in his commission to act in these
10 matters which would enable him to have the concurrent
11 power of the United States Attorney. He was appointed
12 by Mr. Peterson.

13 THE COURT: But even Judge -- wait a minute.

14 MR. VITELLO: Who was the Assistant Attorney
15 General --

16 THE COURT: Even Judge Werker said in his de-
17 cision, did he not that Mr. Peterson had such authority.
18 The Attorney General had the authority to designate
19 the designation power to Mr. Peterson.

20 MR. VITELLO: Has power to delegate under 515
21 U.S.C. Title 28. But he never at any time delegated
22 that authority to Mr. Peterson.

23 THE COURT: Well, Judge --

24 MR. VITELLO: This is part of our --

25 THE COURT: Even Judge Werker said that he had

1 done so, did he not?

2 MR. VITELLO: No. I don't think he said so.

3 THE COURT: Let's take a look at Judge Werker's
4 decision maybe I misread it.

5 MR. VITELLO: Specific arguments we have.

6 THE COURT: Now, wait a minute. On Page 4,
7 "It thus appears that the power to appoint Special
8 Attorneys was properly delegated to Mr. Peterson;" and
9 so forth.

10 Judge Werker said "The power to appoint Special
11 Attorneys was properly delegated to Mr. Peterson."

12 MR. VITELLO: This Giordano case.

13 THE COURT: The Giordano case had nothing to
14 do with this.

15 MR. VITELLO: If they present to me, your Honor --

16 THE COURT: Wait a minute, Mr. Vitello. Judge
17 Werker held in the Crispino case that Mr. Peterson had
18 been properly authorized to make those appointments.

19 So, you can't rely on Judge Werker for that
20 proposition. He held against you.

21 MR. VITELLO: I'm saying, we have our own argu-
22 ments here where we say there is nothing in either
23 the code of Federal regulations or in any documents
24 submitted to this Court that the Attorney General design-
25 nated Mr. Peterson to make the designations of the

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Special Attorney.

THE COURT: Section 515 Title 28 U.S. Code permits the Attorney General to delegate "The Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to Grand Juries in all cases assigned to, conducted, handled or supervised by the Assistant Attorney General in charge of the Criminal Division;" footnote three reads, "the Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to Grand Juries in all cases assigned to, conducted, handled or supervised by the Assistant Attorney General in charge of the Criminal Division."

I don't buy that argument. The only arguments I think you have is the one that Judge Werker's decision said that Section 515a ought to read may when specifically directed by the Attorney General in special cases conduct any kind of legal cases. But I can't find the word "in special cases." It's not in there. That's what Judge Werker read into that statute as I read Judge Pollack's Tenney's decision. They can't find it either, so they disagreed with Judge Werker.

MR. VITELLO: But the arguments I'm presenting,

1 your Honor --

2 THE COURT: Come again?

3 MR. VITELLO: -Is a different argument. If
4 the Court, I will try to make myself clear to the Court.
5 Under 28 U.S.C. 515a in order for Mr. DelGrasso to
6 handle matters which U.S. Attorneys are authorized by
7 law to handle, he must be specially appointed by the
8 Attorney General which he was not. And he must be
9 specifically directed by the Attorney General which
10 he was not.

11 Therefore, I think the authority given, or
12 claimed to have been given by Mr. Peterson to Mr.
13 DelGrasso is a violation of 28 U.S.C. 515. Now, will
14 the --

15 THE COURT: Did not Judge Werker hold against
16 you on that point?

17 MR. VITELLO: I haven't argued it before Judge
18 Werker.

19 THE COURT: I say, but in Crispino that point
20 was argued and he held against you.

21 MR. VITELLO: I'm asking your Honor to hold
22 differently.

23 THE COURT: By what authorities? On what case?

24 MR. VITELLO: This is the case that will decide
25 it.

1 THE COURT: You want me to make a decision
2 ab initio to this even in defiance of Judge Werker's
3 holding to the contrary. Is that what you are saying?

4 MR. VITELLO: I am asking your Honor to read
5 the statute. If you read the same as I do that the
6 Attorney General must specially appoint and must speci-
7 ally direct, then I say, your Honor must decide that
8 the Task Force is represented by Special Attorney
9 Del Grasso, as without authorization in these proceed-
10 ings. That is the point I bring before the Court.

11 THE COURT: I think Judge Werker and now assists
12 on this point, which was also Judge Judd's analysis
13 is as I recall in a case --

14 MR. DEL GRASSO: Persico.

15 THE COURT: Persico, he reached the same con-
16 clusion on this point. I think it's correct.

17 MR. VITELLO: Now, before your Honor finally
18 makes his decision, may I state this to the Court.
19 28 U.S.C. Section 515, of course, gives the Attorney
20 General the authority to make such provision as he
21 considers appropriate authorizing the performance by
22 any other officer, employee or agency of the Department
23 of Justice of any function of the Attorney General.
24 The Attorney General has that authority under Section
25 515.

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1 Now, the next thing before us is an authoriza-
2 tion and direction by the Assistant Attorney General
3 in charge of the Criminal Division. I say what is
4 lacking is this Court has not seen any authorization
5 yet under 515 authorizing the Assistant Attorney
6 General to make appointments of Special Attorneys with
7 all the powers of the United States Attorney.

8 THE COURT: You want the letter authorizing on
9 Point
10 the 28 C.F.R. /55, reads: "Subject to the general
11 supervision and direction of the Attorney General,
12 the following described matters are assigned to, and
13 shall be conducted, handled or supervised by the
14 Assistant Attorney General in charge of the Criminal
15 Point
16 Division." Then, /60 reads, "The Assistant Attorney
17 General in charge of the Criminal Division is author-
18 ized to designate attorneys to present evidence to
19 Grand Juries in all cases assigned to, conducted,
20 handled or supervised by the Assistant Attorney
21 General in charge of the Criminal Division."

22 What more do you want?

23 MR. VITELLO: Your Honor --

24 THE COURT: Those regulations authorize Mr.
25 Peterson to do just what he did.

MR. VITELLO: May I differentiate, your Honor?
Under 28 C.F.R. 0.55 the subject of the general

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1 supervision and direction, the following matters are
2 assigned to the Assistant; coordination of enforce-
3 ment activities, again --

4 THE COURT: Point 60.

5 MR. VITELLO: Not a delegation of power.

6 THE COURT: Point 60 says, "The attorney General
7 in charge of the Criminal Division is authorized to,
8 in all cases, assign to conduct, handle or supervise
9 by the Assistant Attorney General in charge of the
10 Criminal Division."

11 That's what Point 60 says.

12 MR. VITELLO: I have Point 60, your Honor. Mind
13 you, we're talking about all the powers of the United
14 States Attorneys and that what has --

15 THE COURT: We're talking about the powers that
16 they were assigned by the Attorney General to the
17 Assistant Attorney General, who in turn pursuant to
18 that power designated Mr. Del Grasso to present matters
19 to the Grand Jury which he is doing. That's what that
20 section says Mr. Peterson was authorized to do.

21 MR. VITELLO: That's all he has the power to do,
22 under this. Not all the powers of the United States
23 attorneys. This is what they're doing and this is
24 what they're claiming.

25 Now, he has issued subpoenas under 28 C.F.R. 60.

1 THE COURT: He doesn't issue subpoenas, the
2 Grand Jury issues subpoenas.

3 MR. VITELLO: Signed by him, though.

4 THE COURT: The Grand Jury issues subpoenas.

5 MR. VITELLO: Under 60 all they can do is
6 present evidence to the Grand Jury and that's all they
7 can do. The important thing is lacking here, the
8 designation of the Assistant Attorney General by the
9 Attorney General of the United States to act as a
10 United States Attorney. That's why your Honor, we
11 have in this district and in other districts task
12 forces, who assume unto themselves the same powers as
13 U.S. Attorneys, who have been appointed under the law
14 and by the authority of the law.

15 And if the Attorney General wants the Task
16 Forces, Special Forces to act as U.S. Attorneys, then
17 the U.S. Attorney should designate that person.

18 (Continued on next page.)
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1 THE COURT: The United States Attorney when
2 you're appointed United States Attorney you are desig-
3 nated as such by the Attorney General. If you don't
4 believe it, walk to my Chambers and look upon the
5 wall and see who appointed me as Assistant. It was
6 Herbert Brownell. I didn't get a designation from a
7 letter from P. Moore. I got it from Herbert Brownell
8 and he was Attorney General same as Mr. Del Grasso is
9 and in the case of Mr. Del Grasso, the Attorney General
10 authorized Mr. Peterson to make a designation as he's
11 permitted to do under Section 515.

12 MR. VITELLO: That's where I say there is
13 nothing presented to this Court to show the Attorney
14 General's authorized Mr. Peterson to do it.

15 THE COURT: How do you get around Point 60?

16 MR. VITELLO: Only for presentation of evidence
17 that's all that says, your Honor. It doesn't say --

18 THE COURT: That's all we're concerned with.

19 MR. VITELLO: Doesn't say they have the power to
20 act as U.S. Attorney or same powers as U.S. Attorney.

21 THE COURT: They have the power to present matte
22 to the Grand Jury and it involves the law and this is
23 the Grand Jury subpoena. I assume we're dealing with
24 not one issued out of the Strike Force Office as such;
25 is that right?

1 MR. DEL GRASSO: That's correct, your Honor.
2 Issued by the Grand Jury, Grand Jury subpoena same
3 time.

4 THE COURT: I'm not going to grant the motion
5 on that basis. And as I indicated last week, I haven't
6 written anything yet on the similar Strike Force in-
7 volving Mr. MacCaffrey on U. S. Against Santiago.
8 I said that I felt that Judge Werker's decision was
9 incorrect on Section 515a and Judge Pollack's decision
10 and Judge Tenney's decision was more correct and though
11 I put my decision primarily on the ground, Section
12 515a had no special cases. If Congress limited the
13 Court to special cases they would have written those
14 words into the statute not having done so, I didn't
15 think the Court should.

16 MR. VITELLO: Is the motion denied?

17 THE COURT: The motion is denied.

18 MR. VITELLO: May we take that as your order
19 and decision in reference to any possible appeal?

20 THE COURT: To the Court of Appeals?

21 MR. VITELLO: That's what I want to establish.

22 (A short recess was taken.)

23 (Continued on next page.)
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AFTERNOON SESSION 15

THE COURT: Do you want the courtroom cleared?

MR. DEL GRASSO: That's up to the witness's attorney.

THE COURT: Do you want the courtroom cleared?

MR. VITELLO: No, your Honor.

MR. DEL GRASSO: Your Honor, the Government at this time would move to have this Court call the witness Mr. DiBella.

THE COURT: Wait a minute. I'm afraid I'm going to have to clear the courtroom. I'm sorry, except for Assistant U. S. Attorneys.

MR. VITELLO: Your Honor, may a friend of the witness remain?

THE COURT: No, I think its part of the Grand Jury proceeding.

MR. VITELLO: All right.

THE COURT: Not supposed to be anybody present.

(The courtroom is vacated by the people who are not designated to stay.)

MR. VITELLO: First, I have an application and may the defendant be seated, your Honor.

THE COURT: Wait a minute. Wait a minute. Mr. Del Grasso is about to make a motion. You may be heard on the motion as soon as he makes it.

1 MR. VITELLO: It was a different matter.

2 MR. DEL GRASSO: Want him to sit down?

3 MR. VITELLO: May he sit, your Honor?

4 He has a coronary insufficiency and diabetes.

5 THE COURT: Of course.

6 MR. VITELLO: Thank you.

7 MR. DEL GRASSO: The Government, at this time
8 would make a motion your Honor to have the witness
9 Mr. Thomas DiBella held in contempt, civil contempt
10 pursuant to Title 28 U.S. Code Section 1826 for
11 failure to abide by a lawful Court order signed by
12 Judge Jacob Mishler, June 10, 1974.

13 It was an order granting immunity pursuant to
14 Title 18 U.S. Code Section 6002, 6003, that ordered
15 Mr. DiBella to testify. Mr. DiBella was asked a particu-
16 lar question and he refused. He was sworn and he was
17 asked a question and he was given the order was ex-
18 plained to him. Had the Grand Jury foreman ordered him
19 to testify and he refused to do so.

20 THE COURT: What was the question?

21 MR. DEL GRASSO: The question was his employment.
22 Are you employed, sir? He refused to testify. I
23 would state for the record on prior occasions Mr. Di
24 Bella had been brought before the same Grand Jury approx-
25 imately June of 1974 and he refused to testify.

1 He was sentenced to, he was held to be in civil
2 contempt and sentenced to six months by Judge Mishler
3 and I'm asking for the, this Court at this time to
4 also hold him in contempt once again.

5 THE COURT: Does he like it in jail?

6 MR. VITELLO: No, Judge. I have certain objec-
7 tions, if I may voice them.

8 There was an order of Judge Mishler, the defen-
9 dant violated that order. He was sentenced to six
10 months and he served those six months and he was
11 released. At the time of his release he was served
12 with a new subpoena. That's a new proceeding, your
13 Honor, and he came here this morning in response to
14 that subpoena.

15 I respectfully maintain to this Court that there
16 has to be a new order of immunity insofar as Mr. DiBella
17 was concerned because that previous proceeding of
18 June, 1974, has completed and terminated that order
19 does not hold for this new subpoena, your Honor.

20 THE COURT: Will you come back tomorrow?

21 MR. DEL GRASSO: Pardon?

22 THE COURT: Come back tomorrow and I'll sign a
23 new order.

24 MR. DEL GRASSO: Your Honor, the Government
25 contention is that a new immunity order is not neces-

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2 sary.

3 THE COURT: I agree. But, if to overcome that
4 whatever technical effect it might have, I don't think
5 a new immunity order is needed, but I'm assured it's
6 just a question of typing it up. You can bring it
7 up here this afternoon. Plot out Judge Mishler's
8 name and dates and I'll sign it. That will do away
9 with that objection. What else have you got?

10 MR. VITELLO: They still need the approval of
11 the Attorney General, your Honor.

12 THE COURT: We have ruled on that this morning.

13 MR. VITELLO: No, no, I said they still need
14 the approval of the attorney General to make the ap-
15 plication to the Court.

16 THE COURT: For what?

17 MR. VITELLO: Under Title 18 Section 6003,

18 THE COURT: For what?

19 MR. VITELLO: To make the application to the
20 Court to grant immunity.

21 THE COURT: We have got that.

22 MR. VITELLO: I say, it has expired and anyway
23 that's our position, your Honor.

24 THE COURT: You mean the authority to grant im-
25 munity to this witness by the Attorney General has to
 be regotten; is that your position?

1 MR. VITELLO: That is my contention.

2 THE COURT: Have to get a new approval? Have
3 to get a new order? All you need is a new order from
4 this Court at most. I don't know if you need that
5 once he's got immunity. And he's got it.

6 MR. VITELLO: I respectfully submit it's our
7 contention the proceedings have terminated.

8 THE COURT: Let me see.

9 MR. DEL GRASSO: This is a copy. The original
10 immunity has to be in the Court file, the Court folder.
11 But I do have the minutes of the appearance by, of
12 the matter proceeding before Judge Mishler on June
13 10, 1974, where this matter about the immunity was
14 discussed.

15 Whether or not the United States Attorney him-
16 self has authorized the application for the immunity
17 and that matter was also settled in Re: Dep 499 P.2d
18 1175.

19 THE COURT: Well, you are dealing with a new
20 Grand Jury.

21 MR. DEL GRASSO: It's the same Grand Jury.

22 THE COURT: It's the same Grand Jury.

23 MR. DEL GRASSO: Exactly same Grand Jury it was
24 a special Grand Jury.

25 THE COURT: Carry over.

1 MR. DELGRASSO: Pardon?

2 THE COURT: Hold over Grand Jury.

3 MR. DEL GRASSO: Yes, your Honor.

4 THE COURT: Same Grand Jury he needs no new
5 order of this Court. He certainly needs no new authori-
6 zation as I understand it. But because the application
7 for the order talks in terms to appear before the
8 Grand Jury June 10, at which time he may be questioned,
9 if you wish Mr. Del Grasso to sign a new application
10 and have this Court sign a new order, Mr. Del Grasso
11 can go to his office fill in appropriate blanks and
12 bring it back here this afternoon. I will sign a
13 new order. But the same Grand Jury, they don't need
14 any new authorization from the Attorney General and
15 that's for sure, as I see it.

16 MR. VITELLO: May I record my further objections,
17 your Honor.

18 THE COURT: Yes.

19 MR. VITELLO: The witness further objects on the
20 ground of double jeopardy.

21 THE COURT: Double jeopardy?

22 MR. VITELLO: This Grand Jury asked him those
23 questions. They were investigating the same matter.
24 He refused to answer and he was sentenced to six months.

25 Now they are predicating this contempt upon the

1 same questions and answers.

2 THE COURT: He's still under obligation to answer.
3 You can be re-subpoenaed, he can be re-subpoenaed, and
4 re-punished if he doesn't answer.

5 MR. VITELLO: I agree with your Honor it's
6 a new proceeding, but we're proceeding under the old
7 proceeding now. Further, the witness objects in that
8 the special attorney knows that this defendant who
9 was born in 1905 so to be 70 years of age, does not
10 intend to answer his questions and the subpoena is
11 not being used for coercive purposes but is being used
12 for punishment purposes in violation of the law as
13 set down by the Supreme Court.

14 Now, when a man is close to 70.

15 THE COURT: That's not objection.

16 MR. VITELLO: Respectfully.

17 THE COURT: He's got immunity.

18 MR. VITELLO: The Supreme Court has held the
19 subpoena power are only to be used as for coercive
20 purposes not for punishment purposes.

21 THE COURT: It's not being used for punishment
22 purposes.

23 MR. VITELLO: This is our contention, it is.

24 THE COURT: This is to obtain the testimony of
25 this witness.

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1 Every citizen has a duty to give testimony when
2 he's been granted immunity. He can't invoke his
3 Fifth Amendment privilege.

4 MR. VITELLO: This is one of our objections,
5 your Honor, on the ground that they know that he's
6 not going to answer those questions and they're using
7 the subpoena for punishment.

8 THE COURT: Quite to the contrary. They might
9 assume after six months in jail he would feel now is
10 the time to come to answer questions but it's up to him.

11 MR. VITELLO: Further objection to this order
12 on the ground it does not state what activities or
13 crimes are being investigated and that the order directs
14 him to answer all questions.

15 THE COURT: That's right.

16 MR. VITELLO: Whether they are proper questions
17 or legal questions or pertaining to their investigation
18 makes no difference under the terms of this order.

19 To that reason, I respectfully submit for the
20 Court this order is defective.

21 MR. DEL GRASSO: Your Honor, if I may. The
22 Government --

23 THE COURT: It's not a basis; that's not a basis
24 but you go ahead.

25 MR. DEL GRASSO: Just saying there is no question

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2 of double jeopardy here. I can cite a couple of
3 cases which held contempt for refusal to testify,
4 once again to testify constitutes again another con-
5 tempt of this Court as does well establish several
6 offenses.

7 Citing U.S. Versus Hawkins, 9th Circuit case,
8 cited August 12, 1974, number 74-21-70-, I'm sure that
9 it has a number now.

10 Also U.S. versus Gilbard, 426 F.2d, 1965, 9th
11 Circuit, 1960 case; Bullak versus U.S., 265 F.2d, 683
12 cert. denied, 360, U.S. 909, 1959.

13 As to the offense, your Honor, the defense is
14 laid out in the orders, title 18 U.S. Code 1962, and
15 it's explained to Mr. DeBella what the investigation
16 is.

17 MR. VITELLO: I respectfully submit it's not
18 laid out in the order, your Honor.

19 THE COURT: It's laid out in the application.

20 MR. VITELLO: Yes, laid out in the application
21 but not the order.

22 THE COURT: That's all that needs be. What
23 else?

24 (Continued on next page.)
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1 MR. VITELLO: I respectfully ask the Court to
2 direct the Special Attorney to file with the Court
3 under seal all evidence in his possession relating to
4 crimes inquired into by the Grand Jury concerning this
5 witness' participation in those transactions or crimes.
6 Because, your Honor, in view of the many investigatory
7 agencies that the Government has, they can come in
8 later and state that the evidence that they have dis-
9 covered did not come directly or indirectly from any-
10 thing that the witnesses testified to, and we know your
11 Honor that derivative evidence is bad.

12 But the preservation so witnesses' rights is depen-
13 dent upon the integrity and good faith of the prosecuting
14 authorities. Even those of good faith could not be
15 sure that the sources of their information emerging
16 from their investigatory apparatus is untainted by
17 some prohibitive use of tainted testimony or coercive
18 testimony. And for this reason, we don't ask that it
19 be disclosed to us, we ask that it be handed to the
20 Court under seal that, if the Government later on
21 indicts this witness and contends that they did not
22 receive any of this evidence directly or indirectly,
23 as a result of the use of his testimony, then we can
24 establish that they did not know it and it would
25 help us in that kind of an indictment.

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1 THE COURT: Would it be satisfactory for him
2 to list the material if any, if he has rather than
3 file the material?

4 MR. VITELLO: He can list it with the Court and
5 seal it, I don't want to look at it, your Honor, be-
6 cause I'm not entitled to.

7 THE COURT: Of course you're not entitled. Would
8 it be satisfactory?

9 MR. VITELLO: List it, sealed and gave it to
10 the Court, it would be satisfactory to the witness.

11 THE COURT: Any objection to that?

12 MR. DEL GRASSO: Yes, I object to that, your
13 Honor.

14 First, I know of no case in this circuit.

15 THE COURT: All he's doing is saying that he
16 wants to make sure that the Government lists with the
17 Court data whatever evidence it now has against this
18 defendant so that if a question arises in some future
19 date after this witness answers testimony, the Governmer
20 can't take the position that it had this information
21 in its file ahead of time. If, in fact it did.

22 MR. DEL GRASSO: The Government appreciates
23 the taint problem, but taking into consideration that
24 Mr. DiBella has not testified in either of his appear-
25 ances, I don't think the Government should be placed in

1 a position where it should even list the matter which
2 it has already placed before this Grand Jury to whether
3 or not this would effect him in any way as to whether
4 or not he would be indicted. I don't see, he is not
5 testifying. There is no one case I can think of but
6 Judge Friendly wrote in a concurring opinion that
7 he stated that it might be the Government's best interest
8 to seal the evidence that it has against a particular
9 individual.

10 I have discussed this matter with my superior
11 and it has been our contention it should not be sealed
12 at this time.

13 THE COURT: Not going to seal the evidence,
14 asking you to list it and seal the list. I'm not
15 asking you in any way to seal the evidence or in any
16 way put a ham string on it.

17 Is it conceivable you could list whatever evi-
18 dence you have not testimonial evidence just the
19 documentary evidence that you have?

20 MR. DEL GRASSO: That I have presented to the
21 Grand Jury?

22 THE COURT: Whatever you have in your possession,
23 that might in any way implicate Mr. DiBella.

24 Just a list but under seal and held under lock
25 of some sort, by the Court. If in a future date they

1 contend you indicted Mr. DiBella based on testimony
2 that was taken from or leads from what he's testified
3 to before the Grand Jury, you'll have a list and say,
4 well we had this as the evidence, as this list filed
5 with the Court.

6 MR. DEL GRASSO: Well, your Honor, I'm not at
7 liberty to say at this point, not definite because
8 he is a witness, witness' attorney is present as to
9 what is, what has not been presented. I can say there
10 is a great deal of evidence gathered over a number
11 of years concerning this individual; that is available
12 to me that has not been presented to this Grand Jury.

13 THE COURT: Agreed, but the question is can you
14 list it?

15 MR. DEL GRASSO: I just can't list it at this
16 point. I don't have, there are many agencies that
17 have surveys of this individual, have been investi-
18 gating him for a number of years. IT would be just
19 untenable, impossible, really at this point to list
20 it and again, the Government is well aware of the tainted
21 issues. This was discussed by my superior here with
22 the superiors in Washington and they realize the situa-
23 tion. There is no case law which states at this point
24 the Government has to do so.

25 THE COURT: I'm aware of that and I'm trying to

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1 think from your own standpoint, I realize there is no
2 obligation and I'm just trying to think from the Gov-
3 ernment's standpoint this might be impossible.

4 If it's impossible or impractical to do it, then
5 you take your chances. May have that to prove what
6 you have didn't have in a --

7 MR. DEL GRASSO: I would not say, no, I'm just
8 saying very impractical and definitely couldn't be
9 done in a short period of time. If your Honor wishes
10 to pursue the matter, may I have an opportunity to
11 discuss this with people downstairs because they don't.
12 I don't want to be --

13 THE COURT: This is up to you. I'm not going to
14 order you to do it, but it's up to you for your own
15 future protection depending on the other outcome here,
16 you may wish to do it. If you don't wish to do it,
17 I will not compel you to do it. But you'll have to take
18 your chances when you come here before whatever judge.

19 MR. DEL GRASSO: Yes, your Honor. You do wish
20 another application be made and I'll bring it up to you
21 today?

22 THE COURT: That's one of his objections.

23 MR. DEL GRASSO: I would just like to state for
24 the record your Honor an individual that has given
25 testimony before a Grand Jury if that individual is

1 brought before a, brought to testify at a subsequent
2 trial, everything that that individual has testified
3 to at the prior occasion before the Grand Jury, the
4 immunity would be applicable to that individual at the
5 subsequent trial, I'm saying.

6 THE COURT: I agree with you, Mr Delgrasso.
7 I also agree that Mr. Peterson's authorization dated
8 May 28th, 1974, authorizes you to apply for oral order
9 requiring Mr. Thomas DiBella to give testimony or pro-
10 vide other information pursuant to 18 U.S.C. 6002-60003."
11 The authorization to obtain this order is broad enough.
12 The only reason why your application to Judge Mislher
13 talks about the witness' being sued to appear before
14 the Grand Jury on June 10, 1974; "that it is neces-
15 sary to the public interest that the witness be required
16 to answer questions directed to him before the aforesaid
17 Grand Jury."

18 And it just might be somebody said, "Well should
19 have gotten a new order.

20 Because you specified before the Grand Jury,
21 June 10, '74, I don't think it's necessary and why take
22 the chance. You have the authority to do it.

23 To get a new order just a question of presenting
24 it, the form.

25 MR. DEL GRASSO: Yes.

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1 THE COURT: I will sign it.

2 MR. DEL GRASSO: Thank you. Yes, your Honor.
3 I'll have that done this afternoon.

4 THE COURT: Bring it in and I'll sign it.

5 MR. DEL GRASSO: Until that time, your Honor,
6 I guess you are delaying as to the situation with what
7 you are going to do?

8 THE COURT: When does your Grand Jury meet
9 again?

10 MR. DEL GRASSO:: Next Monday, sir.

11 THE COURT: I will delay at least point enough
12 for you to -- whether you want to take him or bring
13 him back or --

14 MR. DEL GRASSO: I'll have that brought up to
15 you.

16 MR. VITELLO: In that respect, your Honor, may
17 we adjourn this matter for the 17th if March?

18 For this reason, February 24, I was to start
19 a murder case before Judge Melia in New York County,
20 the case on trial was not finished and it continued
21 until today.

22 It's still going on and I have been informed
23 by Judge Melia to be on tap as soon as that case goes
24 to the Jury he wants to start that murder case.

25 I had advised him --

1 THE COURT: Your man is going before the Grand
2 Jury this afternoon.

3 MR. VITELLO: I'll wait for the order then.

4 THE COURT: As soon as he presents me with a
5 new order I'm going to sign it. I say it now that in
6 my opinion it's superfluous out of excess of cause.
7 I will sign an additional order but your man is directed
8 as of now to return to the Grand Jury and answer all
9 questions put to him.

10 If he doesn't, but after his new order is signed
11 and Mr. Del Grasso brings him back again, he better
12 get his tooth brush.

13 MR. VITELLO: We'll discuss it your Honor and
14 I'll be available.

15 THE COURT: All right.

16 MR. DEL GRASSO: Thank you, your Honor.

17 (Continued on next page.)
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1 Your Honor, the Government again makes a
2 motion to have Mr. Thomas DiBella held in contempt pur-
3 suant to Title 28 U.S. Code Section 1826 for a re-
4 fusial to answer questions put to him by the Grand Jury
5 through me. I do have the Grand Jury foreman who will
6 testify to the fact that Mr. DiBello was sworn. I
7 do have the reporter who can relate to you the minutes
8 of the Grand Jury.

9 I don't know whether or not Mr. DiBello or Mr.
10 Vitello wants that read into the record but they're
11 available.

12 MR. VITELLO: Yes, your Honor I want it read
13 into the record.

14 THE COURT: Considering the record, you have
15 to step outside.

16 MR. VITELLO: Your Honor, this Sixth Amend-
17 ment right here to counsel --

18 THE COURT: If any portion of the Grand Jury
19 proceedings are read you are not entitled to hear them.

20 MR. VITELLO: Then, I respectfully object,
21 your Honor, on the ground that if you are having a
22 contempt hearing in order to incarcerate with witness
23 he has a right to counsel under the Sixth Amendment.

24 THE COURT: He will have the right to counsel
25 but during the course of the reading of any questions

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1 before the Grand Jury you must be excluded.

2 MR. VITELLO: All right, your Honor, the
3 questions may be read and I will return.

4 THE COUR: You may take your client with you
5 and he may explain it to you what his recollection of
6 the questions were and you can advise him as to whether
7 or not --

8 MR. VITELLO: Do you want him present also?

9 THE COURT: He may be present during the
10 reading.

11 MR. VITELLO: I'll confer with him after the
12 questions are read into the record.

13 THE COURT: Yes, sir.

14 Counsel better take your files with you.

15 MR. VITELLO: Of course, your Honor I'm leaving
16 under objection.

17 THE COURT: I understand you are leaving under
18 objection.

19 That's my understanding of the rules.

20 MR. VITELLO: All right.

21 THE COURT: If I'm wrong, I'm wrong.

22 MR. DEL GRASSO: Your Honor, we can read in
23 the whole record from this morning. We can read the
24 whole record from this morning or just do you want to
25 take it from the point where Mr. DiBella refused to

1 THE COURT: How long is the entire record?
2 Is it lengthy? Is the entire record lengthy or --
3 read it.

4 MR. DEL GRASSO: Swear the foreman.

5 THE COURT: Swear the reporter or the foreman?

6 MR. DEL GRASSO: Well, just, I brought the
7 foreman in frist to show he was sworn as a witness.
8 That Mr. DiBella was sworn as a witness.

9 THE COURT: Swear the foreman.

10 (The witness is duly sworn.)

11 (Continued on next page.)
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1 THE COURT: Do you wish time to consult with
2 your client?

3 MR. VITELLO: Yes, your Honor.

4 At this time if the Court pleases, may the
5 record indicate who was present during this hearing
6 before the Court at the Grand Jury proceeding?

7 THE COURT: The record did indicate.

8 MR. VITELLO: That your Honor was present,
9 the secretary, the reporter was present, the reporter
10 of Grand Jury, the Foreman was present, the Clerk
11 of the Court was present and at certain times your
12 law secretary and your law clerks were present.

13 THE COURT: Yes.

14 MR. VITELLO: That the attorney for the defen-
15 dant was excluded.

16 THE COURT: That's right. My law clerks, I
17 think they are known as, I don't know really. One or
18 both of my law clerks were here, one or both during
19 the portion of this hearing.

20 MR. VITELLO: May we have their names?

21 THE COURT: Bill Thayer and Mark Keenan.

22 MR. VITELLO: Thank you, your Honor. I'm
23 ignorant of what was about to transpire, your Honor.

24 THE COURT: Well, he has been taken before
25 the Grand Jury and refused to answer questions in

2 1 accordance with the directions of this Court.

2 MR. VITELLO: If the Court pleases, I respect-
3 fully raise all the objections I made at my first
4 appearance here as to the strike force and I raise
5 the same objections I made in reference to the order
6 and all the other objections and if the Court will
7 overrule all those objections again, I got it on the
8 record.

9 THE COURT: Yes, I overrule the objections.
10 I have directed him once to go and answer the questions.

11 Do you think he needs another direction or do
12 you want to take the consequences of his failure? Ask
13 him.

14 MR. VITELLO: Your Honor, he has informed me
15 he does not wish to answer those questions. Stands
16 on all the objections made to this Court in reference
17 to those proceedings.

18 THE COURT: Well, would you call my law secre-
19 tary, one of my law secretaries and ask him to bring
20 me the 18 U.S. --

21 MR. DEL GROSSO: 28 -- Title 28, U.S. Code 1826.

22 THE COURT: 1826. All right, now Mr. Di Bella,
23 I am going to direct you for the last time to go and
24 answer the questions put to you including the questions
25 which were just read here before me before the Grand

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Jury. You don't have to answer me, you can answer through your counsel. If you are going to persist in your refusal, you leave me no alternative but to summons you under 16, 1826. So, I hereby direct you to return to the Grand Jury room and answer those questions and any and all other questions put to you by the Grand Jury and the Special Assistant of the Government propounding those questions put to you.

MR. VITELLO: Defendant has stated to me he does not wish to go back to the Grand Jury.

THE COURT: He will not answer the questions?

MR. VITELLO: He will not answer the questions.

THE COURT: All right. I find you in contempt under Title 28, U.S. Section 1826 and I sentence you to confinement, sentence you to the custody of the Attorney General of the United States for confinement, imprisonment at a suitable place until such time as the witness is willing to give the testimony required. Such sentence of confinement or imprisonment to be for six months or for the life of the May 1974 Grand Jury, whichever is shorter.

MR. VITELLO: If your Honor pleases, I respectfully request that your Honor sentence this defendant to a civil jail since this is a civil contempt and direct the Attorney General to incarcerate this witness

1 A 38
2 in a civil jail.

3 THE COURT: To this Court's knowledge there is
4 no civil jail as such in the federal system, but that
5 will be up to the attorney-general.

6 MR. DEL GROSSO: I believe Mr. Di Bella would
7 be lodged at West Street.

8 MR. VITELLO: I object to that, your Honor.
9 Your Honor, that is a house of detention and he has
10 just been found guilty of civil contempt; that is a
11 criminal institution.

12 THE COURT: Same application was made to me in
13 the last criminal contempt proceeding. I inquired of
14 the representatives of the Attorney General and they
15 told me they had no place to house civil contempts
16 separate and apart from any other case.

17 MR. VITELLO: Your Honor, I now respectfully
18 ask the Court to direct the Attorney General to contain
19 the defendant in a hospital at West Street. They have
20 his medical history. He is suffering from diabetes
21 and they know that he is suffering from a coronary
22 insufficiency and they have been giving him pills
23 during the six months he was confined there from July
24 until the end of December of 1974. He was confined
25 in that hospital.

 THE COURT: Well, I don't direct the Attorney

1 General because there is no evidence of the facts you
2 just recited before me but if the Attorney General
3 has such knowledge and as you just stated, I would
4 assume that he would so treat Mr. Di Bella if he
5 doesn't and you wish to bring medical evidence before
6 this Court, the Attorney General is not properly
7 treating Mr. Di Bella, given whatever medical condition
8 claiming he has, I will --

9 MR. VITELLO: If the Court pleases, that record
10 is before the Court and before the Attorney General
11 because motion was made to have him examined by the
12 Government doctors. They did examine him and our
13 doctors examined him. We had the matter before Judge
14 Weinfeld and they both found a coronary insufficiency
15 and diabetes.

16 THE COURT: If Judge Weinfeld found and if that
17 be the fact, if the Attorney General doesn't heed such
18 a prior order, then you can bring it on order to show
19 cause before me. I will consider it at that time but --

20 MR. DEL GROSSO: Judge Weinstein, your Honor.

21 MR. VITELLO: I am --

22 THE COURT: Judge Weinstein.

23 MR. VITELLO: Now, your Honor, my further
24 application is for a stay of execution of sentence in
25 order that we may go to the Circuit Court of Appeals

6 1 as expeditiously as possible and that we have this
2 opportunity to have the defendant remain not incar-
3 cerated during this period. That I think we have
4 substantial constitutional questions here and I think
5 that questions have been raised here where those
6 decisions are available to us. Questions have been
7 raised here where there are conflicts in the decisions
8 of federal judges and I say that this is one case where
9 the stay of execution should be granted.

10 Now, this defendant has a history of appearing
11 whenever he was subpoenaed. In fact, when I was
12 retained as attorney the United States Attorney told
13 me they had a subpoena and I made arrangements for
14 the Marshal to go to the witness' house and have
15 that served. Every time we had a hearing or he was
16 scheduled to appear in court, he appeared. Every time
17 he was scheduled to appear before the Grand Jury he
18 appeared. There is no question of this defendant's
19 now or this witness' ever fleeing the jurisdiction of
20 the Court and in view of his medical history, in fact
21 for 52 years he has been employed on the docks in the
22 City of New York without a blemish, with this kind of
23 a background I say your Honor should release him on
24 his own recognizance and suspend the execution of his
25 sentence pending the decision of the Circuit Court

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2 MR. DEL GROSSO: If the Government may be heard
3 on that. The whole purpose of Title 28, Section 1826
4 is to make provision for exactly this type of situation.
5 Mr. Di Bella has, was afforded immunity on prior
6 occasions and he refused to testify. Again, he still
7 refuses to testify. It's all well and good for him to
8 stay at home and continue to refuse and be in contempt
9 of this Court's order. The only way this order will
10 have any effect is if Title 28, Section 1826 is
11 followed to the law.

12 I am stating here, your Honor, that the Govern-
13 ment position is that Mr. Di Bella is just doing this
14 for the purpose of delay. He is not going to testify
15 and I respectfully ask --

16 THE COURT: You ought to mark into evidence in
17 this proceeding your letter of authorization which I
18 think I've seen a copy of. But I don't know whether
19 it's been marked into evidence in this proceeding.

20 MR. DEL GROSSO: No, I haven't, sir. I'll go
21 to the Clerk and get a copy. As well, I will bring
22 the order up for you to sign.

23 THE COURT: I think you should do that. Because
24 if there is going to be an appeal to the Court of
25 Appeals that much should be part of the record.

MR. DEL GROSSO: Yes, sir, I will bring that up.

THE COURT: Also, for Mr. Di Bella's appeal which he is apparently going to take.

MR. VITELLO: Definitely, your Honor.

MR. DEL GROSSO: I will get it for the record. I believe Mr. Vitello can state --

THE COURT: He has seen it, obviously because he gave me a brief which sets it forth. But I think you ought to have a copy actually marked so that there is no question about that when you two gentlemen start.

MR. DEL GROSSO: Can I have about 10 or 15 minutes?

THE COURT: Yes.

Your application for a time in which to effect an appeal is denied. Of course, you may go to the Court of Appeals and see if you can get time but at the moment, he's being committed to the custody of the Attorney General.

MR. VITELLO: Will your Honor stay the execution until --

THE COURT: It would be undoubtedly unfair to the Court of Appeals. Do it this evening. He is going to prepare them this evening.

One other thing occurred to me. On the minutes containing the transcript of what took place before

Jury, how do you want to handle that?

DEL GROSSO: I would leave that to your discretion. If you wish to excise that, I'm entering the minutes.

COURT: Do you wish to?

DEL GROSSO: I'll abide by the Court's

COURT: Take the portion of the testimony from the man and the reporter and type it up but do not give it to defense counsel. Give it to Mr. Del Grosso to furnish it to the Court of Appeals for their review in the event of an appeal.

VITELLO: My client's been convicted of murder and I can't get a question of minutes of testimony asked him, either proper questions or whether the questions or whether they were legal ques-

COURT: If the Court of Appeals releases the minutes, that's up to them.

VITELLO: Your Honor has the right to

COURT: I have asked the United States Attorney whether he will. I am not going to release the Grand Jury minutes to you for the purposes of appeal. You can argue that as I understand it.

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MR. VITELLO

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9 1 the Grand Jury, how do you want to handle that?

2 MR. DEL GROSSO: I would leave that to your
3 Honor's discretion. If you wish to excise that, I
4 am not ordering the minutes.

5 THE COURT: Do you wish to?

6 MR. DEL GROSSO: I'll abide by the Court's
7 order.

8 THE COURT: Take the portion of the testimony
9 of the Foreman and the reporter and type it up but do
10 not give it to defense counsel. Give it to Mr. Del Gross
11 who will furnish it to the Court of Appeals for their
12 examination in the event of an appeal.

13 MR. VITELLO: My client's been convicted of
14 contempt and I can't get a question of minutes of
15 questions asked him, either proper questions or whether
16 improper questions or whether they were legal ques-
17 tions.

18 THE COURT: If the Court of Appeals releases
19 them to you, that's up to them.

20 MR. VITELLO: Your Honor has the right to
21 do that.

22 THE COURT: I have asked the United States
23 Attorney whether he will. I am not going to release
24 the secret Grand Jury minutes to you for the purposes
25 of the appeal. You can argue that as I understand it.

10 1 This witness is not going to answer any questions before
2 the Grand Jury in defiance of Judge Mishler's order.
3 So, it doesn't make any difference about this. He's
4 not going to answer any questions, he says.

5 MR. VITELLO: Well, if those were improper
6 questions I have a right to raise the fact of improper
7 questions not within the scope of the investigation.

8 THE COURT: You can make that argument and let
9 the Court of Appeals make a determination.

10 MR. VITELLO: I respectfully except your Honor's
11 objection to the --

12 THE COURT: Except all you want.

13 MR. DEL GROSSO: Thank you, your Honor.

14 THE COURT: If the Court of Appeals makes them
15 available to you.

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1 THE COURT: Have to wait until Mr. Di Bella
2 comes back up. We'll mark it in his presence. He's
3 coming.

4 Mr. Di Bella, when your counsel was here, we
5 agreed -- indeed, he said, he wanted that
6 Mr. DelGrosso's letter of authorization for
7 Mr. Henry Petersen be marked as an exhibit in this
8 proceeding. Now, I'll have the Clerk mark
9 Government Exhibit 1.

10 THE CLERK: One document marked. Is that in
11 evidence, your Honor?

12 THE COURT: Yes.

13 THE CLERK: In evidence as Government
14 Exhibit 1.

15 THE COURT: Now, when I pronounced your
16 sentence, I realize your attorney is not here, if you
17 wish to have him here; we're having a recession the
18 sentence when I pronounced your sentence, I think I
19 just said for six months or for the aforesaid jury,
20 whichever period is shorter. I don't know whether
21 I said to you though, I'm sure you understand that
22 you may, by just notifying the United States Attorney
23 or Special Attorney either directly or through your
24 counsel that you wish to testify, in which case, of
25 course, your sentence as soon as you appear for

1 testimony, you will be and give testimony, you will
2 unprefer yourself of this conduct, you may be
3 released from jail sooner. I'm sure you understand.

4 Do you wish to have your counsel present? I
5 will repeat it in his presence. But, you've been
6 through this before so I'm sure you understand all
7 you have to do is appear at any time during the six
8 month period or during the life of the Grand Jury,
9 whichever is shorter. If you answer the questions
10 which are required, you will be released. All right.
11 The order may be filed.

12 THE MARSHAL: Your Honor, he says he couldn't
13 hear.

14 THE COURT: Says he doesn't hear, I'll yell it.
15 Give me the order then. Now, Mr. Di Bella, listen
16 to me. If you can't hear, raise your hand.

17 When you were last here, your counsel was here
18 at that time about twenty minutes ago, half an hour
19 ago agreed with the Court that Mr. DelGrosso's
20 authorization letter was to appear before the Grand
21 Jury signed by Mr. Henry Petersen, Assistant Attorney
22 General, should be marked in evidence in this
23 proceeding for the purposes of your appeal.
24 Mr. DelGrosso now has obtained that letter and I have
25 asked the Clerk to mark that letter Government

1 Exhibit 1 in evidence and the Clerk has done so. I
2 did this because your counsel consented that this be
3 done and he has since left the courthouse that has
4 been done.

5 THE DEFENDANT: Thank you, very much.

6 THE COURT: Don't you say anything in the
7 absence of your counsel.

8 Secondly, when I announced that you were to
9 be committed to the custody of the Attorney General
10 and specified that you be committed for six months
11 or for the life of the May 1974 Grand Jury, whichever
12 period is shorter, I think I neglected to add that
13 in the event during that period of time when you are
14 in custody you decide that you want to get out, all
15 you need do is answer the questions of the Grand
16 Jury. You may notify the Special Assistant,
17 Mr. DelGrosso, either directly or through your
18 attorney that you wish to testify. Come here and
19 answer the questions of the Grand Jury and then, of
20 course, you'll be immediately released. In other
21 words, the key to your release is in your own hands.
22 At any time you wish to testify during the six-month
23 period life of this Grand Jury, whichever is shorter,
24 all you need do is say all I want to do is testify.
25 You testify and you'll be released, you hear that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Did you hear it?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. You may, if you wish,
5 ask the Marshals to bring you back here tomorrow
6 with your attorney if you wish any portion of that
7 explained to you.

8 THE DEFENDANT: Thank you.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN THE MATTER OF :

THOMAS DI BELLA :

NOTICE OF APPEAL

-----x

S I R S :

PLEASE TAKE NOTICE that the above named witness, Thomas Di Bella, hereby appeals to the United States Court of Appeals for the Second Circuit, from an Order of the Honorable Thomas C. Platt, Judge of the United States District Court for the Eastern District of New York, entered on March 3, 1975, holding said witness in contempt and sentencing him to the custody of the Attorney General of the United States or his duly authorized representative for a term of six (6) months or for the life of the grand jury, whichever is shorter, or until such time as the witness shall purge himself of contempt.

Dated: New York, New York
March 6, 1975

Yours, etc.,

PHILIP VITELLO, ESQ.
Attorney for Appellant
630 Ninth Avenue
New York, New York

TO: Clerk
United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

David G. Trager, Esq.
United States Attorney
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Thomas Di Bella
Federal Detention Headquarters
427 West Street
New York, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 52

-----X
IN RE THOMAS DI BELLA

ORDER

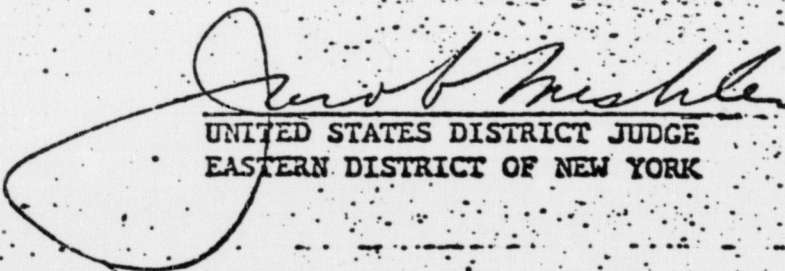
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An application has been made to this Court by the United States Attorney (see application and affidavit annexed and marked "A" and "B" respectively) pursuant to his authorization by Henry E. Petersen, Assistant Attorney General for the Criminal Division of the United States Department of Justice (see copy of letter annexed and marked "C"), wherein the affiant has represented that in his judgment the testimony of THOMAS DI BELLA, before the Special United States Grand Jury in the Eastern District of New York, is necessary to the public interest. Pursuant to Title 18, United States Code, Sections 6002, 6003, it is hereby

ORDERED that THOMAS DI BELLA answer all questions directed to him by the aforesaid Grand Jury in the Eastern District of New York. It is further

ORDERED, that THOMAS DI BELLA shall not be excused from testifying or producing books, papers, or other evidence on the ground that testimony or evidence required of him may tend to incriminate him or subject him to a penalty of forfeiture.

It is further

ORDERED that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against THOMAS DI BELLA in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.


UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Dated: Brooklyn, New York
June 10, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 53-

IN RE: THOMAS DI BELLA

APPLICATION

NOW COMES THE GOVERNMENT, and by its Attorney David G. Trager respectfully requests that an Order be issued by the Court ordering to testify before the Special Grand Jury now sitting in the Eastern District of New York. As grounds therefore, the Government sets forth the following:

1. That the Grand Jury inquiry relates to possible violations of Title 18, United States Code, Section 1962
2. That the witness THOMAS DI BELLA has been subpoenaed to appear before the Grand Jury June 10, 1974 at which time ~~she~~/he will be questioned relating to alleged violations of Title 18, United States Code, Section 1962.
3. That the witness THOMAS DI BELLA is expected to invoke and has invoked the Fifth Amendment as a ground for refusing to answer questions posed to ~~her~~/him by the aforesaid Grand Jury.
4. That it is necessary to the public interest that the witness be required to answer questions directed to ~~her~~/him before the aforesaid Grand Jury.
5. That this application is made with the approval of the Assistant Attorney General for the Criminal Division of the United States Department of Justice (see "B" annexed).

Respectfully submitted,

David G. Trager
United States Attorney

BY:

Robert Wilkerson

Organized Crime Section

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 54

-----X
IN RE THOMAS DI BELLA

AFFIDAVIT

-----X
STATE OF NEW YORK)
COUNTY OF KINGS) SS:

ROBERT G. DEL GROSSO, being duly sworn, says:

1. That he is a Special Attorney for the Department of Justice, and that he has been directed by the Attorney General to assist in the investigation of a criminal matter now pending before a Special Grand Jury of the United States District Court for the Eastern District of New York.

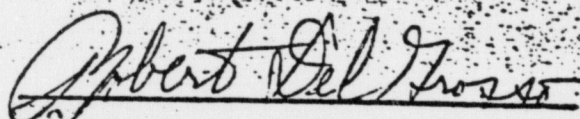
2. That the Grand Jury investigations relates to violations of Title 18, United States Code, Section 1962 inclusive.

3. That the testimony of THOMAS DI BELLA is necessary to the public interest.

4. That the information sought is material and necessary to the investigation being conducted by the Grand Jury.

5. That the application of your affiant in this matter is made in good faith.

6. Based upon information and belief, your affiant anticipates the witness will invoke his Fifth Amendment privilege against self-incrimination when he appears before the Grand Jury.



Organized Crime Section
Department of Justice

Sworn to before me this

10th day of June, 1974

A

55

Richard E. Stanley

NOTARY PUBLIC

STATE OF N.Y. 30-3610090

QUALIFIED NASSAU

TERM EXPIRES 3-30 75

B

Department of Justice
Washington 20530

A 56

MAY 28 1974

Mr. Edward J. Boyd, V
United States Attorney
Brooklyn, New York

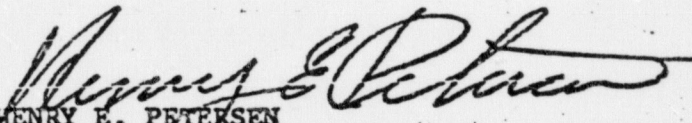
Attention: Mr. Robert G. Del Grosso
Special Attorney
Brooklyn Strike Force

Re: Grand Jury Investigation

Dear Mr. Boyd:

Your request for authority to apply to the United States District Court for the Eastern District of New York for an order or orders requiring Thomas Di Bella to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in the above matter and in any further proceedings resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6002-6003 and 28 C.F.R. 0.175.

Sincerely,


HENRY E. PETERSEN
Assistant Attorney General

"C"

STANT ATTORNEY GENERAL
CRIMINAL DIVISION

Department of Justice

Washington 20530

November 30, 1972

Mr. Robert G. Del Grosso
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Del Grosso:

The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,



HENRY E. PETERSEN
Assistant Attorney General

A 58

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

OATH OF OFFICE (Without Compensation)*

NOT FILMED

I, ROBERT G. Del GROSSO, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Attorney on which I am about to enter in the Eastern District of New York pursuant to the authorization of Henry E. Petersen, Assistant Attorney General, Criminal Division dated November 30, 1972 and filed herewith:
So help me God.

~~XX~~

(Sign here)

Date of Birth

2-14-1945

Date of entry upon duty

11-27-1972

Subscribed and sworn to before

me this 12th day

of December A. D., 1972, at

Brooklyn, N.Y.
(City and State)

(Seal)

Thomas Blanton
(Signature of Officer)

Ch. Deputy Clerk
(Title)

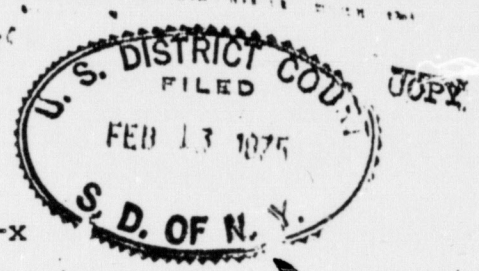
NOTE - If the certificate is executed by a Notary Public, the date of expiration of his commission should be shown.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 1974, a copy of the Brief for Appellee was mailed to Henry J. Boitel, 233 Broadway, New York, New York 10007, attorney for the appellant.

Robert G. DelGrosso
Special Attorney
Department of Justice

A 60



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

PHILIP CRISPINO,

Defendant.

OPINION AND ORDER

74 Cr. 932 (HFW)

#41879

APPEARANCES:

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: William I. Aronwald
Special Attorney
Department of Justice
Of Counsel

JAY GOLDBERG
Attorney for Defendant
299 Broadway
New York, New York 10007

HENRY F. WERKER, D. J.

On October 2, 1974 Philip Crispino was charged by the grand jury with one count of collection of extensions of credit by extortionate means, 18 U.S.C.A. § 894, and one count of interference with commerce by threats or violence, 18 U.S.C.A. § 1951. The attorney who presented the case to the grand jury was Charles E. Padgett, a special attorney with the Organized Crime and Racketeering Section of the Criminal Division, United States Department of Justice. Crispino has

now moved pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure to dismiss the indictment on the ground that Mr. Padgett was not authorized to appear before the grand jury in this case. After a careful review of the statutory framework under which Mr. Padgett was appointed and the cases which have interpreted those statutes, the court has reached the conclusion that Mr. Padgett was not properly authorized to appear before the grand jury and, as a consequence, the indictment must be dismissed.

The statute under which Mr. Padgett was appointed a Special Attorney is codified at 28 U.S.C.A. § 515¹ and provides:

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000.

On June 1, 1973 Henry Petersen, then Assistant Attorney

General in charge of the Criminal Division, wrote the following letter to Mr. Padgett:

Department of Justice
Washington 20530
June 1, 1973

Mr. Charles E. Padgett
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Padgett:

The Department is informed that there have occurred and are occurring in the Southern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,
/s/ HENRY E. PETERSEN
Assistant Attorney General

Since section 515(a) provides that the Attorney General is the official who is to appoint special attorneys, a question arises as to whether Mr. Petersen was authorized to make the appointment. Section 510 of Title 28, United States Code² permits the Attorney General to delegate any of his functions to "any other officer" of the Department of Justice. By regulation, the Attorney General delegated certain of his powers, including the coordination of enforcement activities directed against organized crime and racketeering and the designation of attorneys to present evidence to grand juries, to the Assistant Attorney General in charge of the Criminal Division.³

It thus appears that the power to appoint Special Attorneys⁴ was properly delegated to Mr. Petersen. This is not a case of improper delegation as was found in United States v. Giordano, 416 U.S. 505 (1974). That case involved a question of delegation of power to authorize wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Section 2516(1) of that act allows the Attorney General or any Assistant Attorney General specially designated by the Attorney General to authorize the application. The official who authorized the wiretap in Giordano was in fact the Executive Assistant to the Attorney General. The Court concluded that despite the broad delegation provision in 28 U.S.C. § 510, Congress in enacting § 2516(1) "intended to limit the power to authorize wiretap applications

to the Attorney General himself and to any Assistant Attorney General he might designate." 416 U.S. at 514. In enacting section 515(a) Congress intended to limit the Attorney General's power of appointment to those attorneys with special skills and to special cases or cases of unusual importance to the government but there was no limitation imposed on the Attorney General's ability to delegate his power of appointment of Special Attorneys to other officers of the Department of Justice such as Mr. Petersen.⁵

The more serious and complex question presented in this motion is whether Special Attorney Padgett within the meaning of section 515(a) was "specifically directed by the Attorney General" (or as in this case by a subordinate of the Attorney General to whom the Attorney General had properly delegated the function to appoint Special Attorneys) to present the Crispino case to the grand jury. To resolve this question it is necessary to examine the legislative background of the original act which is now codified as 28 U.S.C. § 515(a) and the cases which have construed that act.

By the Judiciary Act of 1789, 1 Stat. 73, Congress provided for the appointment of attorneys for each district whose duty was to prosecute "crimes and offences, cognizable under the authority of the United States" 1 Stat. at 92. These attorneys were eventually called District Attorneys⁶ and are now known as United States Attorneys. The same act also created the office of the Attorney General who in 1861

was charged with the general superintendence and direction
of the District Attorneys.⁷ Despite the Attorney General's
power of supervision, it was still the function of the District
Attorneys to represent the United States in criminal and civil
actions. See The Confiscation Cases, 74 U.S. (7 Wall) 454,
457-58 (1868).⁸

In 1861 Congress also provided that the Attorney
General could appoint special assistants to the District
Attorneys to aid them in the discharge of their duties.⁹ When
the Department of Justice was created in 1870¹⁰ the Attorney
General was authorized to appoint "special assistant[s] to
the Attorney General" to assist in the "trial of any case."¹¹
As a check on his power to employ special counsel when needed,
Congress required the Attorney General to certify that the
services of special counsel were actually rendered and that
the same services could not have been performed by the Attorney
General or some other officer of the Department of Justice.¹²
See United States v. Crosthwaite, 168 U.S. 375 (1897). From
1861 to 1903 the Attorney General often employed such special
counsel either as assistants to the various district attorneys
or as special assistants to the Attorney General. Such counsel
not only assisted in the trial of cases, but also participated
in grand jury proceedings.¹³ The right of the special attorneys
to appear before grand juries was not questioned until 1903
when in the case of United States v. Rosenthal, 121 F. 862
(C.C. S.D.N.Y. 1903), the Court held that the power of the

Attorney General to conduct and argue any "case" in any court¹⁴
 did not authorize him to make appearances before grand juries.

In Rosenthal, Mr. W. Wickham Smith was commissioned a Special Assistant to the Attorney General "to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York." Rosenthal, supra at 863. Since the Court had concluded that the Attorney General himself was not authorized to appear before grand juries, then special assistants to the Attorney General were not "endowed with a power denied to the chief officer himself." Id. at¹⁵ 869. The powers of the special assistants were limited to participation in trials and litigation already pending. As a direct consequence of the Rosenthal decision, Congress passed the Act of June 30, 1906, 34 Stat. 816, which with a few minor changes is currently codified at 28 U.S.C.A. § 515(a).¹⁶ This act enabled special attorneys to conduct legal proceedings, including grand jury proceedings, "when specifically directed by the Attorney General."

The legislative history of the Act of June 30, 1906 provides an important source for understanding the purposes of the statute as envisioned by Congress. Cf., United States v. Wise, 370 U.S. 405, 414 (1962); Flora v. United States, 362 U.S. 145, 151 (1960) ("frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation". See also N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 274 (1974). The Act of 1906,

was introduced in both Houses of Congress, and it was the
 17
 House version of the bill that passed. The House Report
 18
 which accompanied the bill provided as follows:

Mr. Gillett of California from the Committee on the Judiciary submitted the following:

The Committee on the Judiciary, having had under consideration the bill (H.R. 17714) to authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General, respectfully report the same back with the recommendation that the same do pass.

The purpose of this bill is to give to the Attorney-General, or to any officer in his Department or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

It has been the practice of the Attorney-General for many years to employ special counsel to assist district attorneys in the prosecution of suits pending in their respective districts whenever the public interest demanded it. It has been the practice of such special counsel to appear, with the district attorney, before grand judges and committing magistrates and to assist in the proceeding pending there. This right passed unchallenged for many years, until the Circuit Court for the Southern District of New York, on March 17, 1903, in the case of the United States v. Rosenthal, decided that --

The Attorney General, the Solicitor General, nor any officer of the Department of Justice, is authorized by sections 359, 367, or any other provision of the Revised Statutes of the United States [U.S. Comp. St. 1901 pp. 207, 209], to conduct, or to aid in the conduct of, proceedings before a grand jury, nor has a special assistant to the Attorney General such power.

And the court further held that --

A special assistant to the Attorney General, appointed to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York, and to prepare and conduct such civil and criminal proceedings as may result therefrom, is not authorized by law to conduct, or to aid the conduct of, proceedings before a federal grand jury, and indictments based upon such proceedings so conducted should be quashed upon motion.¹⁹

This decision makes the proposed legislation necessary if the Government is to have the benefit of the knowledge and learning of its Attorney-General and his assistants, or of such special counsel as the Attorney-General may deem necessary to employ to assist in the prosecution of a special case, either civil or criminal. As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be to the interests of the Government to have the assistance of one who is specially or particularly qualified by reasons of his peculiar knowledge and skill to properly present to the grand jury the question being considered by it.

The Attorney-General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of such usual [sic]²⁰ importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.

It seems eminently proper that such powers and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future.

If such a law is necessary to enable the

Government to properly prosecute those who are violating its laws, it is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury.

There can be no doubt of the advisability of permitting the Attorney-General to employ special counsel in special cases, and there can be no question that if he has been employed because of his special fitness for such a special case that the Government should have the full advantage of his learning and skill in every step necessary to be taken before the trial, including that of appearing before grand juries.

The law proposed by the bill under consideration seems to be very necessary, because of the decision in the Rosenthal case, hereinbefore referred to, and the committee recommend its speedy enactment.

H. R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) (emphasis
21
added).

The House Report leaves no room for doubt that Congress intended the Attorney General to have the power to appoint special attorneys to prosecute a particularly important case or a special case or cases. This power was seen as a necessary aid to effective law enforcement. Rather than restricting the appearances of these attorneys to the trial of cases, it was deemed appropriate that they appear in every step of the litigation including grand jury proceedings. However, since the district attorneys and their regular assistants had the responsibility for prosecuting all crimes in their districts, the appearance of special attorneys before

grand juries was limited to special cases where the Attorney General concluded that the particular knowledge and skill of these special attorneys would be useful.

Subsequent to the enactment of what is now section 515(a), challenges to the authority of special attorneys to appear before grand juries presented a number of courts with the problem of interpretation of the statute. Specific issues raised included whether the commission of the special attorney had to specify (1) the case(s) to be investigated; (2) the district(s) in which the investigation was to take place; and (3) the statute(s) which was to be the basis for the indictment against the defendant. The commission letter of the special attorney was in fact the "specific direction" of the Attorney General, United States v. Huston, 28 F.2d 451, 454 (N.D. Ohio 1928), and it is the language of that letter which formed the basis for motions to dismiss indictments brought by special attorneys.

A rule of strict interpretation was formulated in United States v. Goldman, 28 F.2d 424 (D. Conn. 1928) where an attorney, who was commissioned as a Special Assistant to the United States Attorney for the district of Connecticut, appeared before a grand jury not to assist the district attorney, but to act as a stenographer. In construing the commission of the special attorney, the Court concluded that:

As we understand it, the commission which may be issued under that act must designate the specific case or cases to which the

employment relates and the district or districts to which it extends. If this is not so, it would follow that the Attorney General of the United States could, under the act now under discussion, issue a roving commission without any limitations, extending to every district in the United States and embrace all criminal investigations.

Goldman, supra at 430 (emphasis original). No other court has adopted such a strict interpretation of the statute. Indeed, other cases not discussed by the court in Goldman, had established that the commission need not name every case to be investigated and every district in which the investigation was to take place. Such was the holding in United States v. Morse, 292 F. 273 (S.D.N.Y. 1922). In that case, one Fletcher Dobyns was appointed a special attorney by the Attorney General to investigate persons engaged in the sale of stock of certain named corporations. The appointment letter specifically referred to the Southern District of New York and to the particular criminal statutes that were being violated. Mr. Dobyns did not limit his investigation to the companies and persons named but extended it to interrelated companies and persons having to do directly or indirectly with the sale of their stock. In upholding the right of Mr. Dobyns to appear before the grand jury in those cases, then district judge Augustus N. Hand concluded that:

The letter of appointment would naturally relate to causes of action, criminal or civil, in which the United States was interested growing out of the relation. I see no reason for assuming, because on

the face of the letter no interrelation is set forth, that it is not sufficiently specific. Indeed, it probably is as specific as was possible, if adequate power to deal with the situation without impairment of usefulness or unnecessary reduplication of labor were to be given. Nor does the fact that proceedings may be taken in more than one district render the authority broader than the act of 1906 justifies, for no such limitation seems necessarily involved in the language of the act, and to impose it would cause unnecessary inconvenience in enforcing the law.

Morse, supra at 276. The test relied upon by Judge Hand was "whether the designation as counsel which he received from the Attorney General was sufficiently specific." Id. at 275 (emphasis added).

United States v. Huston, 28 F.2d 451 (N.D. Ohio 1928)
22
is in accord with Morse. In that case, the special assistant to the Attorney General received two commissions each of which specified several defendants "and others associated with them" to be investigated and which named the statutes violated. The first commission named the Western District of Missouri and the second the district of Minnesota as the places where the cases were pending. The special attorney was authorized to conduct legal proceedings in those two districts "or in any judicial district where the jurisdiction thereof lies." This last phrase became important since the indictment was returned in the Northern District of Ohio. The court, faced with the problem of interpreting what it called "this enigmatical phrase," concluded that the special attorney was not authorized

to appear before the grand jury in Ohio for

No charge brought against the defendants here [Ohio] by the bill under consideration has any dependent or ancillary connection with the alleged crimes in either Minnesota or Missouri. Here he [the Special Attorney] began de novo to assist in the development of a possible but independent offense, whose existence depended upon facts peculiarly and particularly within the jurisdiction of this district alone, with which neither the Missouri nor Minnesota district had any concern whatever.

Huston, supra at 456. Thus, the fatal element in the Huston case was not that the commission failed to specify the Northern District of Ohio, but that the Ohio investigation was not "ancillary" to the properly authorized investigations
23
in Missouri and Minnesota.

Two cases hold that it is not necessary that the commission letter name the particular statutes on which the indictments were based. The Special Assistant to the Attorney General in United States v. Amazon Industrial Chemical Corporation, 55 F.2d 254 (D. Maryland 1931) received a commission which specified the particular case and several named defendants to be investigated. The commission did not refer to the particular federal statutes which were allegedly violated. The court considered this a "mere matter of form and not of substance," and cited the principle that "even if the wrong statute is named in an indictment, the indictment may be good, provided the facts alleged therein constitute a crime." Amazon, supra at 256-57. United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948) is to the same effect and

is also consistent with Morse, supra. In Powell the Special Attorney was commissioned to investigate irregularities in a certain general election in the Eastern District of Missouri. The indictment returned against the defendants involved the primary election and not the general election. Recognizing that the statute [then 5 U.S.C.A. § 310] was²⁴ mainly for "the protection of the United States" and should be given the meaning which is more helpful and practical in²⁵ the dispatch of the government's business, the Court concluded

that fraud in a Primary to select candidates for such General Election is not so far removed as to be an abuse of authority or complete deviation from authority, nor is the fact the indictment was returned under a statute other than the statute named in the commission grounds for dismissing the indictment.

Powell, supra at 291.

Perhaps the case which gives the broadest response to the question "was the special attorneys commission sufficiently specific," see Morse, supra, is United States v. Hall, 145 F.2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871 (1945). After a lengthy and thorough discussion of the power of the Attorney General to appoint special attorneys, District Judge Hall, in United States v. 1,960 Acres of Land, 54 F. Supp. 867 (S.D. Cal. 1944) had concluded that the local district attorney must initiate and prosecute condemnation proceedings on behalf of the Government in order to give

the court jurisdiction. The Ninth Circuit in Hall disagreed and issued a writ of mandamus directing Judge Hall to assume jurisdiction. The issue involved the setting up of a "lands division" office in the Southern District of California by the Department of Justice. Special Attorneys were assigned to the office and specifically directed to conduct certain "Lands Division" cases as may be assigned to them. In holding that the special attorneys were authorized to conduct the proceedings, the court concluded

that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office.

Hall, supra at 785 (emphasis added). It should be noted that in Hall the local district attorney had agreed that the specialized work of the Lands Division could best be handled without his assistance. The result was consistent with the legislative history of now section 515(a) where Congress recognized the need for the appointment of special attorneys with "peculiar knowledge and skill."

For almost twenty-six years after the decision in Powell, supra, there were few significant cases in which the power of special attorneys to appear before grand juries was in issue. This dormant period ended two months ago when

in United States v. Williams, Docket No. 74 Cr. 47-W-1 (W.D. Mo. orders of 11/15/74 and 12/3/74) the court dismissed an indictment because of the failure of the Government to sufficiently respond to discovery orders entered by the court which related inter alia to the authority of certain "strike force" attorneys to present the Williams case to the grand jury. ²⁸ After the Williams case was unofficially reported a number of defendants in this district and others, including ²⁹ Crispino, made motions similar to those in Williams.

Williams was charged in a one count indictment with making a false entry in a record required to be kept by the labor union of which he was president, a violation of 29 U.S.C. § 439(c). The alleged violation took place in 1969, and since the indictment was not returned until 1974, ³⁰ an issue of pre-indictment delay was raised by the defendant. At an evidentiary hearing held in July, 1974 in connection with several pending motions, the court, apparently sua sponte, questioned the authority of the strike force attorneys to appear before the grand jury in the Western District of Missouri. Subsequent to that hearing the defendant made motions for dismissal based on the appearance of an unauthorized attorney before the grand jury. ³¹ Motions were also made pursuant to Rules 7 and 16 of the Federal Rules of Criminal Procedure for a bill of particulars and discovery relating to internal guidelines, agreements and memoranda of the Department of Justice as to the authority of the strike force

attorneys to appear before the grand jury and the efforts made to secure approval from the Justice Department for the prosecution of Williams. On October 21, the court granted the motion for discovery and directed the material to be produced for its in camera inspection.³²

In response to the court's order, the government took the position that the special attorney was properly authorized under section 515(a) and that any requests for purely internal documents of the Justice Department would violate the interests of confidentiality in law enforcement and the exercise of prosecutive discretion. The government also asked the court to reconsider its initial order, and stated that it might "suffer dismissal" of the case if the order was not modified. The court refused to modify its original order and on November 15, 1974 issued a lengthy opinion and order which gave the government ten additional days to comply with the order. When the government did not make an adequate response, the court issued an order on December 3, 1974 dismissing the indictment with prejudice.

The case at bar differs from Williams in several respects: (1) there are no issues involving pre-indictment delay; (2) questions concerning who actually signed the commission letter and whether internal Justice Department documents should be produced are not seriously pressed;³³ and (3) most important of all, the commission letters of the special attorneys in Williams differ markedly from

the commission letter of Mr. Padgett. The commission letter set out in full in the Williams case authorized the special attorney [Mr. DeFeo] to assist in the trial of cases growing out of certain transactions named in the letter. The letter then specified over twenty different statutes which may have been violated. Included among the list was 29 U.S.C. § 439, the statute under which Williams was indicted. This court must respectfully disagree with any intimation made by the court in Williams in its analysis of section 515(a) and the cases construing that section (see the November 15, 1974 opinion in Williams at pp. 24-36), that the special attorneys in that case were not properly authorized to appear before the grand jury. Those commissions are consistent with the analysis of the commissions in the cases discussed supra, and were clearly "sufficiently specific" as called for by Judge Hand in Morse, supra.³⁴

But what of the commission of Mr. Padgett in this case? Is it consistent with the intent of Congress in passing the act of 1906, with the cases construing that act, and with the practice of other Attorney Generals who have issued commissions to special attorneys? Is it "sufficiently specific"? This court concludes that it is not.

The first paragraph of Mr. Padgett's commission states:

The Department is informed that there have occurred and are occurring in the Southern District of New York and other

judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time (emphasis added).

The second paragraph appoints Mr. Padgett a special attorney to assist in the trial of and conduct proceedings in connection with the "aforesaid cases." But what are these "aforesaid cases"? The first paragraph says they are cases involving the violation of "federal criminal statutes." Can this be considered a "specific direction from the Attorney General as required by the statute"? Is this commission "sufficiently specific"? Clearly not. It is precisely the opposite. It is as broad and as vague as possible. Nowhere in the commission is there any attempt to give a description of the type of cases -- such as "organized crime cases," or "Lands Division cases," or "tax fraud cases," etc. -- which Mr. Padgett may be commissioned to investigate and present to grand juries.

The legislative history of section 515(a) and the cases analyzed in this opinion show that it is not necessary to specify in the commission letter all the defendants who may be indicted, or all the cases which are pending, or all the statutes which may be violated for the statute should be given an interpretation that is helpful to the prosecution of cases by the government. But the one element that is common to every case which has either upheld or dismissed challenges to the authority of special attorneys to appear before grand

juries is that the commission letter at least described particularly the type of cases (e.g., "Lands Division" cases in United States v. Hall, ³⁵supra) that the special attorneys were to present to grand juries. That element is conspicuously missing in this case. Nowhere is there an attempt to conform to the intent of Congress in limiting the appearance of special attorneys before grand juries to "cases of particular importance" where those "specially or particularly qualified" by reason of "peculiar knowledge and skill" would be helpful to the prosecution of important cases by the government. Surely it is no argument to say that any violation of a "federal criminal statute" involves a case of particular importance where those with peculiar knowledge and skill not possessed by the local United States Attorney and his assistants are ³⁶needed to prosecute the case.

The commission letter issued to Mr. Padgett is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of its importance and regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supersede the local United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any cases involving a violation of a "federal criminal statute." Congress never intended to give such a broad authority when it passed the Act of 1906

even if the statute be for the "protection of the United States," and no case contruing that statute supports such a proposition.

Moreover, the practice of a number of Attorney Generals for at least 50 years had been to make the commission letter as specific as possible so as to comply with the intent of Congress. Such a longstanding policy of construction by a number of Attorney Generals cannot be overlooked. In response to inquiries made by this court, the attorney in charge of the "strike force" for this district furnished the court for its in camera inspection an internal Department of Justice memorandum of May 18, 1972, from Mr. Joseph Cella of the Criminal Division to Mr. Harold Koffsky, Chief of the Legislation and Special Projects Section of the Criminal Division. It was shortly after this memorandum was submitted that the Department changed the form of the commission letter from that such as given to Mr. DeFeo in Williams, to the type
37
issued to Mr. Padgett.

Undoubtedly, the Attorney General of the United States has a serious and difficult responsibility in combating "organ-
38
ized crime." If he feels that the local United States Attorneys and their regular assistants cannot be as effective in the prosecution of "organized crime" cases as special attorneys, then he should be able to appoint special attorneys with particular knowledge and skill to prosecute those cases and
39
present them to the grand jury. That is precisely why Congress

passed what is now section 515(a). But that power is limited to such specialized areas as cases against "organized crime" and was never meant to extend to the prosecution of any case which involved a violation of "a federal criminal statute." If the Attorney General felt that the commissions to his special attorneys would be unduly restrictive if they were limited to "organized crime cases" or "Lands Division cases," etc., then he should have asked Congress to amend section 515(a). He had no authority to issue a broad roving commission such as the one given to Mr. Padgett with its complete lack of any specific direction.

It is of little consequence that the indictment presented by Mr. Padgett to the grand jury concerned an "organized crime" case, for no mention of "organized crime" cases was made in his commission. It is the assertion of authority by the Attorney General in issuing the broad and sweeping commission that cannot stand.

This court is aware of the impact this decision may have upon the special attorneys already designated by the "blanket commissions," and the cases already presented to grand juries by those attorneys. However, Congress has placed certain limitations and requirements on the appointment of special attorneys, and these conditions have not changed in almost seventy years despite an attempt at amendment of the Act. ⁴⁰ The intent of Congress cannot be changed by the unilateral act of the Attorney General. The importance of requiring a

department to adhere to the letter of the enabling legislation is basic to the preservation of the balance between the branches of our government. Recent events have shown that⁴¹ abuse results when that rule is not observed.

One final question must still be answered -- does the unauthorized appearance of Mr. Padgett before the grand jury require the dismissal of the indictment? A long line of cases supports the policy as expressed in United States v. Edgerton, 80 F. 374 (D. Montana 1897):

There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in Lewis v. Commissioners, 74 N.C. 1974, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury?

See United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953); United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971); United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972). See also United States v. Daneals, 370 F. Supp. 1289 (W.D. N.Y. 1974). Compare United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 369 U.S. 828 (1969). Clearly, the list of persons permitted to appear before grand juries by Rule 6(d) of the Federal Rules of Criminal Procedure does not include unauthorized government attorneys.

The indictment must be dismissed. SO ORDERED.

Dated: New York, New York
February 13, 1975

Henry F. Wecker

U. S. D. J.

UNITED STATES OF AMERICA v. PHILIP CRISPINO, 74 Cr. 932

NOTES

1. This section originates with the Act of June 30, 1906, 34 Stat. 816, previously codified at 5 U.S.C. § 310.
2. That section provides that: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."
3. 28 C.F.R. § 0.55 reads in pertinent part as follows: "Subject to the general supervision and direction of the Attorney General, the following described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General in charge of the Criminal Division: (g) Coordination of enforcement activities directed against organized crime and racketeering." Under 28 C.F.R. § .60 "The Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to grand juries in all cases assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division."
 28 C.F.R. § 0.55 was amended by Order No. 543-73, 38 F. R. 29585 (Oct. 26, 1973) to read: "Subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General"
 The change does not affect the validity of the delegation to Mr. Petersen. For one thing, the amendment was made after Mr. Petersen had sent the commission letter to Mr. Padgett (June 1, 1973). Also, as discussed infra, nothing in the legislative history of what is now section 515(a) indicates that Congress intended to limit the delegation of the Attorney General's power to appoint special attorneys. Compare United States v. Giordano, 416 U.S. 505, 512-523 (1974).
4. Crispino originally questioned whether Mr. Petersen was the person who actually signed Mr. Padgett's commission letter. However, at oral argument his counsel agreed to accept the government's representation that Mr. Petersen signed the letter. In addition, the government is in the process of obtaining an affidavit from Mr. Petersen, as to the authenticity of his signature on the letter.
5. The House Report discussed infra, other than those

limitations mentioned, does not limit the Attorney General's delegation powers. See May v. United States, 236 F. 495 (8th Cir. 1916).

6. The wording of the statutory duty of the United States Attorneys is basically the same as in 1789. 28 U.S.C. § 547 reads in part: "Except as otherwise provided by law, each United States Attorney, within his district, shall -- (1) prosecute for all offenses against the United States"
7. Act of August 2, 1861, 12 Stat. 285, previously codified at 5 U.S.C. § 317.
8. In Sutherland v. International Ins. Co., 48 F.2d 969,
(continued on next page, page ii)

970 (2d Cir. 1930), Judge Learned Hand commented that the Confiscation cases had "announced obiter (page 457 of 7 Wall) that it was the settled rule of United States courts to recognize no suits prosecuted in the name and for the benefit of the United States unless it was represented by a district attorney. While this is perhaps not conclusive, as it was not in any sense made the basis of the decision, it cannot be disregarded" See also United States v. Rosenthal, (C.C. S.D.N.Y. 1903). In San Francisco v. United States, 21 Fed. Cas. 365-371, (No. 12, 316) (C.C. N.D. Cal. 1864) (Field, J.) the court made the following comment on a dispute between a special attorney and the local district attorney: "The position of the district attorney in claiming the control of the case was entirely correct. He is the regular officer of the government, having charge of all the legal proceedings within his district, subject only to the general direction and supervision of the Attorney General. When other counsel are employed in these proceedings, it is to aid him in their management, not to assume his authority or direct his conduct. The position of Mr. Williams was solely that of Assistant Counsel. He could not conduct the proceedings in the case, or bind the government by his admission or action."

9. Act of August 21, 1861, 12 Stat. 285, previously codified at section 363 of Rev. Stat. (1873), and 5 U.S.C. § 312, currently codified at 28 U.S.C. § 543(a) (1970).
10. Act of June 22, 1870, 16 Stat. 162.
11. Act of June 22, 1870, 16 Stat. 162, previously codified in section 366 of Rev. Stat. (1873), and 5 U.S.C. § 315, and currently codified at 28 U.S.C. § 515(b). By Act of April 17, 1930, Congress added to the wording of then 5 U.S.C. § 315 so that the attorneys could be commissioned special attorneys rather than special assistant to the Attorney General. The extra wording was only added to end the confusion over the term "special assistant to the Attorney General" which had created misunderstandings because of the prestige associated with the term. See H. R. Rep. No. 229, 71st Cong., 2d Sess. (1930) at 1.
12. The applicable section of the Rev. Stat. (1873) provided:

"Sec. 365. No compensation shall hereafter be allowed to any person, beside the respective District Attorneys and Assistant District Attorneys, for services as an attorney or counsellor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on

the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the District Attorneys.

In United States v. Crosthwaite, 168 U.S. 375, 379 (1897) the court noted that "[i]t was left to that officer [the Attorney General] to determine whether the public interests required the employment of special counsel. But that the discretion given to him might not be abused, and that unnecessary expense might be avoided, it was declared (§ 365) that, except in the cases of the respective District Attorneys and Assistant District Attorneys, no compensation should be allowed . . . unless specifically authorized by law" Crosthwaite specifically held that special attorneys are not regular Assistant District Attorneys. Id. at 381.

13. See H. R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) at 1.
14. 121 F. at 866-67.
15. There was some controversy as to whether the decision in Rosenthal implied that attorneys appointed as special assistants to the District Attorneys as well as those appointed special assistants to the Attorney General were prohibited from appearing before grand juries. The question turned on whether section 366 of the Rev. Stat. and its limitation of assistance to "the trial of any case" had to read together with section 363 under which special assistants to the district attorneys were appointed. Compare Rosenthal, *supra*, and United States v. Virginia-Carolina Chemical Co., 163 F. 66 (C.C. M.D. Tenn. 1908) with United States v. Twining, 132 F.129 (D.N.J. 1904) and United States v. Cobban, 127 F. 713 (C.C. D. Mont. 1904).
16. That the Rosenthal decision caused Congress to enact what is now section 515(a) is made clear by the House Report discussed infra.
17. The Senate version of the bill (S. 2969) did not contain the limitation "specifically directed by the Attorney General." See 40 Cong. Rec. 7913-14 (1906). The full text of the bill is as follows:
 "A BILL. To authorize the Attorney-General and certain other officers of the Department of Justice and special assistants

and counsel to begin and conduct legal proceedings in any courts of the United States and before any commission or commissioner or quasi judicial body created under the laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Attorney-General, the Solicitor-General, the Assistant to the Attorney-General, the Assistant Attorneys-general, special assistants to the Attorney-General, special assistants to the district attorneys, and special counsel appointed under any provision of law are hereby authorized to begin and conduct any kind of legal proceedings, civil or criminal, in any court of any judicial district, or before any commission or commissioner or quasi judicial body created under the laws of the United States, including grand jury proceedings, whether they reside in the judicial district where such proceedings are brought or not: Provided, that all such proceeding shall be begun and conducted by such officials, attorneys, and counsel only under the direction, supervision, and control of the Attorney-General."

S. 2969, 59th Cong., 1st Sess. (1906). Senate Report No. 3835, 59th Cong., 1st Sess. (1906) provided:

The Committee on the Judiciary, to whom was referred the bill (S. 2969) authorizing the Attorney-General and certain other officers of the Department of Justice to conduct legal proceedings in any court of the United States, having considered the same, report the bill favorably without amendment.

It is frequently desirable and even necessary that the Attorney-General should detail an officer of his Department to assist some United States attorney in the investigation and prosecution of cases of unusual importance or interest, or to make an independent investigation and report the result to the Department, and, if necessary, to prosecute the same: or, where this latter is impracticable, to appoint a special assistant to the Attorney-General, or special counsel to act independently of the United States attorney, particularly

in criminal matters.

In 1903 the Attorney-General, appointed a special assistant to investigate and report in the Japanese silk fraud cases, and it was held (121 Fed. Rep. 826, U. S. v. Rosenthal) that a special assistant to the Attorney-General is not an officer of the Department of Justice under sections 359 and 367, Revised Statutes, or other provisions of the United States Statutes, and the indictment was quashed because of the presence of this attorney in the grand jury room. That case further holds that neither the Attorney-General, the Solicitor-General, nor any officer of the Department has the power to conduct or aid in the conduct of proceedings before a grand jury. It is clearly a great importance that they should have this power.

After asking for reconsideration of the House bill, Senator Kean remarked: "I have examined the House bill. It is much better than the Senate bill, and I withdraw my objection." 40 Cong. Rec. 9662.

18. While some Courts which have construed section 515(a) make reference to the House Report, none sets forth the report in detail. The report is quoted here in full so that the intent of Congress in passing the act may be better understood,
19. The quotations are from the headnotes to Rosenthal, and not from the body of the text.
20. This appears to be an error and the word should be unusual.
21. There was a minority report where objection was made to the power of special attorneys to appear before grand juries. The full report reads:
Views of the Minority. We can not agree to the report of the majority of the committee on this bill.
We are in favor of it, excepting that portion embraced within the words "including grand-jury proceedings."
There is no objection to the employment by the Government of special counsel and the giving to such counsel all the rights and privileges named in the bill, save the right to appear before the grand jury, and in its room have the prerogative and power of the

district attorney. The grand jury is a secret inquisition. Everything taking place in its room is sacred, and in our judgment no person save the district attorney and his assistants in the court for where it is held should be permitted in its secret sessions to advise and control it. To grant the Attorney-General the right to have special and learned counsel to assist in the prosecution and conviction is one thing, to have such counsel aid in receiving an indictment is a very different thing.

Why should the Attorney-General be permitted to name some non-resident counsel to go before a grand jury to aid in procuring an indictment any more than he should be permitted to name a member of the grand jury itself who was a nonresident?

It seems to us that part of the bill as reported should be stricken out, especially in view of the fact that the Attorney-General himself has the right in any case of sufficient importance to appear in person.

R.M. Nevin
Geo. A. Pearre

22. "We are inclined to agree with Judge Hand, in United States v. Morse (D.C.) 292 F. 273, 276, that a special assistant to the Attorney General may be 'specifically directed,' in satisfaction of the statute, to more than one district in the same designation, provided that such authorization is specific as to the cause of criminal action which may have ramifications in more than one district involving the same associated parties." United States v. Huston, 28 F.2d 451, 453 (N.D. Ohio 1928).
23. "We are unable to find this expression [or in any judicial district where the jurisdiction thereof lies] sufficient to fully clothe the special assistant, receiving such a commission, to conduct evidence before a grand jury in any other district than that specially named, except in proceedings instituted, to be ancillary to the case sought to be made in the main district." Huston, supra at 455 (emphasis added).
24. The language originated in Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941). Although the persons indicted in that case were not named in the commission of the special attorney the court held that the words of then 5 U.S.C. § 310 "do not require the naming of the persons or the particular cases to be

prosecuted. Mail fraud cases in the Eastern District of Louisiana were specifically enough mentioned"
Id. at 114.

25. This interpretation is found in United States v. Martins, 288 F. 991 (D. Mass. 1923). In that case the authority of a special assistant to the United States Attorney for the district of Massachusetts to present cases to a grand jury was upheld. The court concluded that "[t]he language of the statute is almost equally open to either interpretation; i.e., that the direction must be for the specific case, or for a specified kind of proceedings. This being so, the statute should be given the meaning which is the more helpful and practical in the dispatch of the government's business, especially as the meaning has been placed upon it by the Department concerned. As the Attorney General can unquestionably make case by case designations, to give the statute the narrower interpretation would result only in useless red tape." Id. at 992. Martins is not inconsistent with the analysis of the cases discussed infra, since it requires at a minimum a direction for a specified kind of proceeding. However the decision is of dubious precedential value for any proposition since the Court apparently misconstrued the intent of the statute [Rev. Stat. § 363 and now § 515(a)]. To the court in Martins, "[b]roadly speaking, the intention of the statutes appears to have been to authorize the Attorney General to designate Assistant United States Attorneys and to prescribe their duties." Id. (emphasis added). This is clearly a misinterpretation of the statutes. Their intent was to allow the Attorney General to appoint special attorneys. The theory that a special attorney could be considered an Assistant United States Attorney was squarely rejected in United States v. Crosthwaite, 168 U.S. 375 (1897).
26. The commission read in part: "I have delegated to you, and I hereby specifically direct that you exercise, plenary authority to sign and file on behalf of the United States, any and all pleadings, briefs, papers or documents in the District Court in and for the Southern District of California which you may consider necessary or proper for the conduct of such Lands Division cases as have been, or may be in the future, placed and maintained under your supervision by the Department of Justice."
27. United States v. Morton Salt, 216 F. Supp. 250 (D. Minn. 1962), aff'd, 382 U.S. 44 (1965), merely recognized that the commission does not have to name every division within a judicial district where special attorneys are assigned. In Wall v. United States, 384 F.2d 758 (10 Cir. 1967),

the court upheld the authority of special attorneys to assist in the trial of the case and noted that "[d]ecisions concerned with participation in grand jury proceedings by unauthorized persons are not applicable." Id. at 763 (footnote omitted). In United States v. Andreas, 374 F. Supp. 402 (D. Minn. 1974), the authority of the Watergate special prosecutor to sign an information was supported by inter alia section 515(a).

28. An appeal has been filed in Williams, but argument to the circuit court has not yet been made.
29. Summaries of the two orders filed in the Williams case were reported in 16 Crim. L. Rptr. 2223-26 (Dec. 11, 1974). There are at least three other similar motions pending in this district and the Court has been informed that similar motions have been filed in several other districts. District courts in Florida, Nevada and California have, within the last two weeks, denied similar motions but no opinions were issued, only a brief order or an endorsement. An opinion was filed in United States v. Brodson, No. 74-Cr.-98 (E.D. Wis. January 31, 1975). Among the many motions raised in that case was a Williams type motion, which was denied by the Court. The Court noted that "[t]he sole issue is whether assistant attorney general Henry E. Petersen was authorized and empowered to commission the special attorney in this case. I conclude that he was." Id. at 14.
30. The summary of facts on the issue of pre-indictment delay in Williams indicated that special attorney DeFeo made two unsuccessful attempts to obtain permission from his superiors in Washington to indict Williams. See the Nov. 15, 1974 order at pages 19-21. The court concluded that "[w]hat has been briefly said in regard to those and the other circumstance clearly establishes that a substantial due process question of preindictment delay is presented in this case and that the material ordered produced may well contain evidence favorable to the defendant." Id. at 21.
31. After the July 22 hearing in Williams, his attorneys filed a motion to dismiss in which they argued that only the Department of Labor was the proper governmental authority to conduct the investigation. This position was subsequently modified and the objection made that it was the United States Attorney not a special attorney who should have appeared before the grand jury.
32. The order required the government to produce for the Court's in camera inspection: "Any Department of Justice

guidelines, agreements, memoranda of understanding or regulations not published in the Code of Federal Regulations which touch upon: (a) The basic authority pursuant to statute of the special attorneys appearing in this case to represent the United States in the Western District of Missouri. (b) Their authority to appear before grand juries and otherwise to prosecute cases involving the statutory violation alleged in the indictment herein. (c) The relationship guidelines and division of authority between the purported authority of the special attorneys and the constitutional statutory or any other authority of the United States Attorney for the Western District of Missouri. (d) The legislative history of 28 U.S.C. §§ 509, 510, 515 and 543. (e) Each document or memoranda set forth in the Stipulation of July 22, 1974, pertaining to the "special attorneys'" efforts to secure authority from their superiors at the Department of Justice to prosecute the defendant in connection with the subject matters of this indictment. This request embraces any and all memoranda and rough notes made as a result of phone conversations and face-to-face discussion. (f) Any and all other memoranda, correspondence and written actions taken thereon concerning requests for approval of prosecution of defendant for the offense purportedly stated in the written indictment." Paragraphs (a)-(d) related to the appearance of the strike force attorney while paragraphs (e) and (f) concerned preindictment delay.

33. At oral argument on this motion, Crispino's counsel agreed to accept the government's representation that Mr. Petersen signed the commission.

Crispino's initial motion, made prior to moving to dismiss under Rule 12(b)(2), was for particulars and discovery pursuant to Rules 7 and 16 of internal documents of the Justice Department. The language is almost word for word the language used in the Williams discovery order. The Williams decision was merely appended to the the papers with no discussion of the distinguishing facts and issues in that case. A check on similar motions filed with other judges in this district shows a similar pattern. The cases decided prior to Williams which involved the authority of special attorneys to appear before grand juries do not discuss any need for discovery of internal Justice department documents, for none was needed. The issue was resolved by examining the statutes, their legislative history, decisions construing them and the commission letters themselves. A motion pursuant to Rule 12(b)(2) as subsequently made by Crispino is sufficient to raise the issue of Mr. Padgett's authority and no discovery is needed. The court's discovery order

in Williams appears to be influenced by the preindictment delay issue.

One further issue present in Williams but absent here is the propriety of the oath taken by the special attorney. In Williams, Mr. DeFeo inserted additional wording into the oath himself. In the case at bar, the oath merely referred to the commission letter and incorporated it.

34. It is interesting to note that in the November 15, 1974 order in Williams at footnote 10, the court quoted a letter sent to Mr. DeFeo on August 2, 1974 from Acting Assistant Attorney General John C. Keeney and remarked: "If anyone is under the impression that no Attorney General would ever attempt to assume that Section 515(a) confers power and blanket authority to appoint a duplicate set of Department of Justice Special Attorneys to serve in the various judicial districts throughout the United States, one should read with interest Acting Assistant Attorney General Keeney's letter of August 2, 1974 to Mr. DeFeo, written after the question of Mr. DeFeo's authority in this case was raised." That letter is almost an exact duplicate of the letter sent to Mr. Padgett in the case at bar.
35. United States v. Twining, 132 F. 129 (D. N.J. 1904) (specific case named); United States v. Rosenthal, 121 F. 862 (C.C. S.D.N.Y. 1903) ("fraudulent importations of Japanese silks"); United States v. Virginia-Carolina Chemical Co., 163 F. 66 (M.D. Tenn. 1908) (fertilizer trust cases); May v. United States, 236 F. 495 (8th Cir. 1916) (oleomargine cases); United States v. Morse, 292 F. 273 (S.D.N.Y. 1922) (sale of stock of certain named corporations); United States v. Martins, 288 F. 991 (D. Mass 1923) (specific cases named); United States v. Huston, 28 F.2d 451 (N.D. Ohio 1928) (specific cases and statutes named); United States v. Goldman, 28 F.2d 424 (D. Conn. 1928) (violations of the National Prohibition Act); United States v. Amazon Industrial Chemical Corporation, 55 F.2d 254 (D. Maryland 1931) (specific case named); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) (mail fraud cases); United States v. Sheffield Farms, 43 F. Supp. 1 (S.D.N.Y. 1942) (specific antitrust statutes named); United States v. Hall, 145 F.2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871 (1945) (Lands Division cases); United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948) (specific cases named).
36. There appears to be an internal controversy in the Justice Department as to whether the regular United States Attorney, or the strike force attorneys can do a better job in the struggle against "organized crime," with reports being

circulated by both pro and anti strike force groups within the Justice Department. See N. Y. Magazine, Feb. 3, 1975 at p. 9.

37. The identity of the Justice Department official who made the decision to change the commission letter is not definitely known. In a letter to this court, William I. Aronwald, Attorney-in-Charge of the strike force in this district, stated: "I have been informed by Paul Walsh, a Department Attorney assigned to the Legislative Affairs Section of the Criminal Division that he has discussed this matter with Mr. Koffsky, who is the former Chief of the Legislative Affairs Section, and that to Mr. Koffsky's best recollection, the final decision to effectuate a change in the format of a letter was made by Henry Petersen, the former Assistant Attorney General in charge of the Criminal Division. It should be noted however, that Mr. Koffsky does not know whether Mr. Petersen discussed this matter with either the Deputy Attorney General or the Attorney General. In addition, I am informed by my superiors that they have no recollection as to whether this decision was made by the Attorney General, Deputy Attorney General or Mr. Petersen."

38. One problem associated with prosecuting "organized crime cases" is deciding what in fact is an "organized crime" case. In New York State, where a statewide organized crime task force has been established by section 70-a of the Executive Law (McKinney 1972), one court has recently held that certain indictments must be dismissed because, inter alia, section 70-a is unconstitutionally vague in that it gives no definition of "organized crime." People v. Ron-Ore Soil Systems, Ind. # 2521 (Sup. Ct. Onandaga County Jan. 21, 1975). The court noted that "Conspicuously absent from § 70-a, is a comprehensible definition of "organized crime" and an ascertainable standard that limits the investigative and prosecutorial scope of OCTF's [the New York Organized Crime Task Force] authorized activities." Id. at 6.

In the House Report on the Organized Crime Control Act of 1970, 84 Stat. 922, several congressmen in expressing dissenting views noted: "[O]ne searches the bill in vain for a definition of "organized crime." In a criminal statute where the term "organized crime" is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was." H. R. Rep. No. 91-1549, 91st Cong. 2d Sess.

In the Statement of Findings and Purpose of the Organized Crime Control Act of 1970, organized crime was described as follows: The Congress finds that (1) organized crime

in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

39. The use of "strike force" attorneys to prosecute organized crime cases has grown continually since the concept was initiated in 1967. The growth of the "force" is described in each of the Annual Reports of the Attorney General for the years 1967-73. In the Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, on the Organized Crime Control Act of 1970, 91st Cong., 1st Sess. (1969) at p. 110, then Attorney General Mitchell described the "strike force" as follows:

The strike force concept is bottomed on the view that a highly effective investigative effort can be achieved if investigators from different government agencies work together as a team. A strike force composed of experienced supervisory investigators and attorneys, concentrating their efforts on a single, identified Cosa Nostra

family, can accomplish more than the loosely coordinated effort of the different agencies operating through routine and established practices. Central to the strike force design is the concept of mutual planning, based on combined intelligence and pooled experience. Participants in the project have the dual function of participating in the formulation of the group's strategy and coordinating the implementation of that strategy by their agency. In effect, each participant is a conduit for the dissemination of intelligence information to and from his agency for the other participants. Additionally, the agency representative insures that the group acts in compliance with the internal regulations of his agency. It is of paramount importance to the project that assigned members must be of supervisory level. Each participant must be able to secure the unqualified cooperation of his agency's local office, and to make or obtain high level decisions on the conduct of investigations by local or field personnel of his agency.

40. An attempt to amend then 5 U.S.C. § 310 [now 28 U.S.C. § 515(a)] so as to eliminate the condition "when specifically directed by the Attorney General" was made by introducing legislation in 1945. The Senate Bill, S. 1519, 79th Cong., 1st Sess. (1945) was introduced by Sen. McCarran, and on Oct. 26, 1945 it was referred to the Committee on the Judiciary. The Bill was never reported out of the committee. The full text of the proposed bill provided:

A BILL. To amend the Act authorizing the commencement and conduct of legal proceedings under the direction of the Attorney General.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Act entitled "An Act to authorize the commencement and conduct of legal proceedings under the direction of the Attorney General," approved June 30, 1906 (34 Stat. 816; 5 U.S.C. 310) be, and it hereby is, amended to read as follows:

"That the Attorney General or any officer or attorney of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provisions of law may conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing

magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

The House bill, H. R. 4470, was identical to the Senate bill.

41. The fact that Congress has approved budgets of the Justice Department which indicate that a number of strike forces have been set up is irrelevant. Congress, of course, presumes that its authorization has been properly implemented.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 100
MAR 25 3 41 PM '75
S.D. OF N.Y. ORIGINAL

UNITED STATES OF AMERICA :

- v - :

PHILIP CRISPINO, :

Defendant. :

MEMORANDUM DECISION

74 Cr. 932 (HFW)

-----x
HENRY F. WERKER, D. J.

#42097

The indictment in this case was dismissed in an opinion and order dated February 13, 1975. The government now asks for reconsideration (reargument) of that decision and reinstatement of the indictment in the light of several recent decisions in this Circuit. See United States v. Albanese, 74 Cr. 814 (E.D.N.Y. February 19, 1975); United States v. Brown, 74 Cr. 867 (S.D.N.Y. February 25, 1975); Sandello v. Curran, M-11-18 (S.D.N.Y. February 27, 1975); In re Langelo, 74 Cr. 638 (E.D.N.Y. February 27, 1975); United States v. Jacobson, 74 Cr. 936 (S.D.N.Y. March 3, 1975). See also In re Persico, 75 Civ. 96 (E.D.N.Y. February 7, 1975).

The defendant has opposed the motion as untimely under local rule 9(m). It would perhaps be the better part of valor to take refuge in that rule and decline to entertain the motion. I have chosen however to reconsider my opinion in the light of my brothers' decisions. I still adhere to the original opinion.

MICROFILM

MAR 26 1975

The government for the first time has brought to my attention that there are detailed procedures internal to the Department of Justice which coordinate the work of United States Attorneys and "Strike Force" Attorneys. However neither that disclosure nor a careful consideration of the broad powers vested in the Attorney General pursuant to 28 U.S.C. §§ 509, 510 have persuaded me that the authorization given to Mr. Padgett was proper. These sections were given due consideration at the time of preparation of the earlier decision; no reference to them was made since the specific statute 28 U.S.C.A. § 515(a) controlled and in effect limited or modified the broad powers vested in the Attorney General by §§ 509, 510. Statutory construction would indicate that the specific statute rather than the general statute controls.

Admittedly time and conditions have changed from 1906, especially in the area of organized criminal activity. This gives the Attorney General no excuse for circumventing enabling legislation no matter how sincere his intentions.

Mr. Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 479 (1928) expresses my sentiments with respect to this argument:

" Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.
* * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

Several of my brothers' opinions indicate that the authorization letters such as Mr. Padgett's which are now issued to "Strike Force" Attorneys can be "comfortably" read to include "specific directions" from the Attorney General as required by section 515(a). They are apparently so construed because the authorization letters direct those attorneys to conduct any kind of legal proceedings. No previous court has so construed the letters unless there was a sufficient specific authorization with reference to a definable subject matter. Whether such specific authorization could be found in Mr. Padgett's letter was the very question which had to be answered. My conclusion in this case was that the authorization to conduct any kind of proceeding in any case involving a violation of a federal criminal statute was not sufficiently specific to satisfy the statute.

My brothers have chosen to ignore the fact that the Attorney General in 1945 was "uncomfortable" enough with the "specifically directed" language of section 515(a) to submit legislation to the Congress which had as its sole purpose the elimination of the "when specifically directed" requirement. See Crispino note 40. The legislation died in committee. This plain though tacit disapproval of any dilution of the statutory requirement by the only body that can delineate the powers of the Attorney General was not mentioned in any of their opinions.

I must assume that the internal memorandum of the Justice Department on the question of authorization (See Crispino at 22) was not asked for or read by my brothers. Knowledge of its contents is incompatible with a finding that section 515(a) can be "comfortably read" to encompass the Padgett type authorization.

I must also disagree with the portrayal by my colleagues of the dire consequences that could result if "Strike Force" Attorneys are found to have been operating without proper authorization since 1972. The spectre of convictions being overturned and racketeers let loose is, in my opinion, illusory. A motion to dismiss an indictment based upon the presence of an unauthorized person before the grand jury must be made prior to trial or it is waived. See Advisory Committee Note To Rule 12 of the Federal Rules of Criminal Procedure.¹

Much has been made of the fact that Presidents have sent messages to Congress stressing the need and importance of combatting organized crime and that the strike forces have received much publicity before, and budget approval by, Congress. Yet section 515(a) remains in effect as it was enacted in 1906. Such messages and events do not amend laws. Perhaps I have not breathed enough of the air in the different atmosphere that my brothers assert prevails today. Be that as it may I continue to believe in the principle that Congress is the body that must change

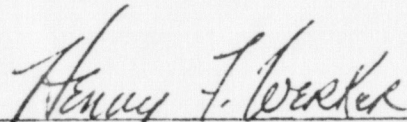
section 515(a) if that is what is necessary to give the "Strike Force" Attorneys the unfettered discretion they may justifiably need to combat organized crime.

" In a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher for good or ill it teaches the whole people by its example." Brandeis, J., in Olmstead, supra at 485.

The motion is denied.

SO ORDERED.

Dated: New York, New York
March 24, 1975



U. S. D. J.

UNITED STATES OF AMERICA v. PHILIP CRISPINO, 74 Cr. 932 (HFW)NOTE

1. It should also be noted that those recent opinions which have dealt with the problem of witnesses who refuse to answer questions before grand juries because of the presence of "Strike Force" Attorneys have not considered whether such persons prior to indictment have standing to raise such an issue. Cf. United States v. Calandra, 414 U.S. 338 (1974); United States ex rel. Rosado v. Flood, 394 F.2d 139, 141 (2d Cir.), cert. denied, 393 U.S. 855 (1968); Gelbard v. United States, 408 U.S. 41 (1973); In re Grand Jury Proceedings, 436 F.2d 85 (3d Cir. 1973).

PRIOR OPINION OF THE COURT OF APPEALS
499 F. 2d 1175

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1218—September Term, 1973.
(Argued June 27, 1974 Decided July 3, 1974.)
Docket No. 74-1813

In the Matter of
THOMAS DI BELLA,

A Witness Before a Special May, 1974 Grand Jury
in the Eastern District of New York.

Before:

MOORE and FEINBERG, *Circuit Judges*,
and PALMIERI, *District Judge*.*

Appeal from citation for civil contempt, 28 U.S.C. § 1826,
for refusing to answer questions before the grand jury.
Affirmed.

HENRY J. BOITEL, New York, N.Y. (Philip Vitello,
on the brief), *for Appellant*.

ROBERT G. DELGROSSO, Attorney, Department of
Justice (David G. Trager, United States At-
torney for the Eastern District of New York;

* Of the United States District Court for the Southern Dis-
trict of New York, sitting by designation.

Opinion of the Court of Appeals

Gerard T. McGuire, Attorney, Department of Justice, on the brief), for Appellee.

FEINBERG, *Circuit Judge*:

Thomas Di Bella appeals from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, holding him in civil contempt. For reasons given below, we affirm the judgment of the district court.

— We state the relevant facts briefly since the issue is narrow, the matter is urgent and we are commanded to dispose of the appeal "as soon as practicable, but not later than thirty days from the filing of" the appeal—a period which in this case expires on July 13, 1974.¹ In May 1974, a Special Attorney attached to the Brooklyn Strike Force applied to the Department of Justice for authorization to seek an immunity order regarding appellant Di Bella in his appearance before a special grand jury in the Eastern District of New York. This body was empanelled to investigate racketeering—in particular, illegal gambling and loan sharking and related activities. A designated Assistant Attorney General approved the request. Thereafter, the Special Attorney applied to the United States District Court for the Eastern District of New York for an order granting immunity to Di Bella under 18 U.S.C. §§ 6002-03, reproduced in the margin.² In the course of the hearing

¹ 18 U.S.C. § 1826(b) reads in pertinent part: "Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

² 18 U.S.C. § 6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,
(2) an agency of the United States, or

Opinion of the Court of Appeals

on the application, the United States Attorney for the Eastern District personally appeared and signed the application for an immunity order. Chief Judge Mishler then granted the immunity sought. Nevertheless, Di Bella refused to answer questions put to him, despite the court's

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003 provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 or this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Opinion of the Court of Appeals

order to do so. The judge thereafter held Di Bella in civil contempt, and sentenced him to a term of six months or the life of the grand jury, whichever proved to be shorter, or until such earlier date as he chose to purge himself by complying with the order to testify. Execution of the sentence was stayed, and the matter is before us on an expedited appeal from the judgment of contempt.

Appellant's argument is bottomed on alleged defects in the procedure followed by the Government in securing the grant of immunity. He claims that 18 U.S.C. § 6003, see note 2, contemplates a three-step method of obtaining immunity orders for grand jury witnesses: (1) application to the Attorney General, his Deputy or designate; (2) approval by one of these officials; and (3) subsequent request to the court. Appellant claims that steps one and three in this procedure require the personal approval and participation of the United States Attorney for the district in which the grand jury is convened. It is conceded that in this case the Special Attorney—without the knowledge of the United States Attorney—procured the Department of Justice approval and applied to the district court to immunize Di Bella. According to appellant, this rendered invalid both the order of immunity and the contempt order based upon it.

Appellant relies heavily on the language in 18 U.S.C. § 6003(b) that "*A United States attorney* may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an [immunity] order . . . when *in his* judgment" (emphasis added) the statutory criteria are met. The language by its terms applies only to step three in the process, the request to the district court for an order granting immunity. But according to appellant, this manifests a congressional desire to circumscribe immunity grants by

Opinion of the Court of Appeals

limiting them to instances where, in the judgment of the United States Attorney, the testimony of the individual "may be necessary to the public interest" and is not likely to be given without an immunity grant. *Id.* Therefore, appellant argues, the same restrictions that govern step three in the process must apply to the first step as well.

We do not concur in this reasoning. The statute says nothing about *how* Department of Justice approval—admittedly present here—must be obtained. In the absence of specific contrary language, we see no reason why the request to the Attorney General cannot be made by an authorized agent other than the United States Attorney—in this instance, the Special Attorney. Congressional concern over the process would appear satisfied if, as was the case here, both the Attorney General or his statutory designate and the United States Attorney agree on the desirability of immunity before a court actually grants it.⁸ We

⁸ In his reply brief, appellant makes an argument not addressed to the court below; i.e., that the Regulations of the Department of Justice support his position. 28 C.F.R. § 0.175. Although long-standing administrative interpretation of a statute is entitled to weight, *Brennan v. OSHRC (Gerosa)*, 491 F.2d 1340, 1344 (2d Cir. 1974), we put to one side the length of time that this regulation has been in effect since we do not find it dispositive.

Appellant also relies on the recent case of *United States v. Giordano*, 42 U.S.L.W. 4642 (U.S. May 13, 1974), which strictly construed the requirement of 18 U.S.C. § 2516(1), requiring that applications for electronic surveillance be approved by the Attorney General or his specific designate. This decision is not really in point, however, since it deals with a procedure analogous to our step two, *supra*, compliance with which is not at issue here.

Opinion of the Court of Appeals

do not suggest, however, that it is sound policy for even the first step to be taken without the knowledge and concurrence of the United States Attorney. Chief Judge Mishler properly emphasized

... the difficulty we have in having two law enforcement agencies in the district, one strike force and the other the United States Attorney. . . .

He further remarked:

... I pointed up the problem that we have in having the Strike Force make applications in the name of the United States Attorney when the United States Attorney has no supervision or jurisdiction or very little. That's another problem. You might point that up to the Attorney General.

Nevertheless, these are questions of proper administration and do not affect the statutory requirement.*

We believe that this substantially disposes of the appeal. While appellant tells us that the United States Attorney was ignorant of the application to the district court for an order immunizing Di Bella—what we have called step three—the point is not emphasized. The obvious reason is that the *nunc pro tunc* proceeding, sensibly initiated by Judge Mishler, at which the United States Attorney appeared and signed the necessary papers, honored the apparent mandate of the statute. Cf. *United States v. Giordano*, *supra* note 3, at 4648 n.12. On the other hand, the Special Attorney presses this issue, claiming that even at this last stage the approval and participation of the United States Attorney is not required. Strictly speaking, the question is not before

*We were told at oral argument that the failure of communication here was due to recent changes in top personnel in the Strike Force and the United States Attorney's office.

Opinion of the Court of Appeals

us because the United States Attorney, as indicated, did approve and sign the application for an order, albeit belatedly. But in the exercise of our supervisory power over a procedure that will obviously recur, we note that the wiser course in the future would be to directly involve the United States Attorney in the application to a district court for an immunity order.

Having found that the immunity order was in all respects properly procured, we affirm the judgment of contempt entered upon Di Bella's failure to obey the court's command to answer the prosecutor's questions.

**Constitutional, Statutory & Regulatory Provisions
Involved**

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

United States Code

18 U.S.C. § 6002

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this

Constitutional, Statutory & Regulatory Provisions Involved

part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

*18 U.S.C. § 6003**§ 6003. Court and grand jury proceedings*

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 6004

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

*Constitutional, Statutory & Regulatory Provisions Involved**28 U.S.C. § 510**§ 510. Delegation of authority*

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

Added Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.

*28 U.S.C. § 515**§ 515. Authority for legal proceedings; commission, oath, and salary for special attorneys*

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specifically retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000.

Added Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.

*Constitutional, Statutory & Regulatory Provisions Involved**Regulations**28 C.F.R. § 0.175**Judicial and Administrative Proceedings*

(a) The Assistant Attorney General in charge of the Criminal Division is authorized to exercise the authority vested in the Attorney General, by §§ 2514 and 6003, of Title 18, United States Code, to approve the application of a U.S. Attorney to a Federal court for an order compelling testimony or the production of information before or ancillary to a court or grand jury of the United States, and the authority vested in the Attorney General by § 6004 of Title 18, United States Code, to approve the issuance by an agency of the United States of an order compelling testimony or the production of information by a witness in a proceeding before the agency, when the subject matter of the case or proceeding is either within the cognizance of the Criminal Division or is not within the cognizance of the divisions or administration designated in paragraphs (b) and (c) of this section.

(b) The Assistant Attorney Generals in charge of the Anti-trust Division, the Civil Division, the Civil Rights Division, the Internal Security Division, the Land and Natural Resources Divisions, and the Tax Division, are authorized to exercise the power and authority vested in the Attorney General by §§ 2514 and 6003 of Title 18, United States Code, to approve the application of a U.S. Attorney to a Federal court for an order compelling testimony or the production of information in any proceeding before or ancillary to a court or grand jury of the United States when the subject matter of the case or proceeding is within the cognizance of their respective divisions: Provided,

Constitutional, Statutory & Regulatory Provisions Involved

however, That approval shall be granted only with the concurrence of the Assistant Attorney General in charge of the Criminal Division.

(c) The Assistant Attorney Generals designated in paragraph (b) of this section, and the administrator of the Drug Enforcement Administration are authorized to exercise the authority vested in the Attorney General by § 6004 of Title 18, United States Code, to approve the issuance by an agency of the United States, of an order compelling testimony or the production of information by a witness in a proceeding before the agency when the subject matter of the proceeding is within the cognizance of their respective Divisions, or the Administration: Provided, however, That approval shall be granted only with the concurrence of the Assistant Attorney General in charge of the Criminal Division. [Order 445-70, 35 F.R. 19397, December 23, 1970, as amended by Order 520-73, 38 F.R. 18381, July 10, 1973]

28 C.F.R. § 0.55

General functions

Subject to the general supervision and direction of the Attorney General, the following-described matters are assigned to, and shall be conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division:

* * * * *

(g) Coordination of enforcement activities directed against organized crime and racketeering.

28 C.F.R. § 0.60

*Designation of attorneys to present evidence
to grand juries*

The Assistant Attorney General in charge of the Criminal Division is authorized to designate attorneys to present evidence to grand juries in all cases assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division.


Order 487-72, 37 F.R. 13695, July 13, 1972.

United States Court of Appeals
Second Circuit

In Re Thomas DiBella

Henry J. Boitel, being an attorney admitted to practice in the United States Court of Appeals for the Second Circuit, hereby certifies that March 28, 1975, he personally served the office of the United States Attorney for the Eastern District of New York (Strike Force) with a copy of the within Brief and Appendix, and also mailed a copy of same to the United States Department of Justice, Washington, D.C, as requested by the office of the Attorney General of the United States.

New York, New York
March 28, 1975


HENRY J. BOITEL

